Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

KANSAS CITY SOUTHERN RAILWAY COMPANY, INC.,
Petitioner,

v.

J.C. JOHNSON AND KERRY LYNN JOHNSON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court, in conflict with decisions of the United States Court of Appeals for the Fifth Circuit and other courts, can create a special evidentiary rule of documentary proof to preclude the defense of federal preemption under the Federal Rail Safety Act of 1970 and 23 C.F.R. § 646.214?

2. Whether the Mississippi Supreme Court erred in holding, in direct conflict with this Court's decision in *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), that changed circumstances at a crossing following the installation of federally funded traffic control devices terminate the federal preemption of a railroad's duty under state tort law to install adequate warning devices at rail-highway crossings?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are the petitioner and respondents listed in the caption.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it is a wholly owned subsidiary of Kansas City Southern Industries, Inc. Petitioner further states that no publicly traded company owns ten percent or more of the stock of Kansas City Southern Industries, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kansas City Southern Railway Company, Inc., ("KCS") respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court in this case.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court (App. 1a-15a) was entered on February 8, 2001 and has been designated by the Mississippi Supreme Court for publication, but has not yet appeared in the Southern Reporter, Second Series. It is currently available at 2001 WL 107864 (Miss. Feb. 8, 2001). The order denying the petition for rehearing (App. 20a) was entered on May 10, 2001, and is not reported. The order of the Circuit Court of the First Judicial District of Hinds County overruling petitioner's motion for summary judgment on grounds of preemption (App. 18a-19a) was entered on June 4, 1998, and is not reported. The order of the Circuit Court granting in part and denying in part petitioner's motion for judgment notwithstanding the verdict or for new trial (App. 16a-17a) was entered on March 4, 1999, and is not reported.

JURISDICTION

The opinion and final judgment of the Mississippi Supreme Court were entered on February 8, 2001. The Mississippi Supreme Court denied KSC's petition for rehearing on May 10, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e), 130, and 409 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) and are reprinted in App. 21a-27a. The regulation at issue in this case is 23 C.F.R. § 646.214 and is reprinted in App. 27a-28a.

STATEMENT OF THE CASE

In *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344, 352-59 (2000), this Court elucidated the standards for federal preemption of state tort law claims alleging that a railroad installed or maintained inadequate warning devices at railway-highway crossings. This Court held that the installation of federally funded warning devices at crossings is the touchstone of federal preemption under the Federal Rail Safety Act of 1970 ("FRSA") and 23 C.F.R. § 646.214(b)(3) and (4). *Shanklin*, 529 U.S. at 353-54. The "national uniformity" sought by Congress in enacting FRSA, see 49 U.S.C. § 20106, will only be achieved if both state and federal courts apply this standard in a uniform manner.

In this case, however, the Mississippi Supreme Court sought to avoid the result mandated in *Shanklin* by inventing a new, heightened evidentiary standard that is to be applied solely to a railroad's preemption claim and that is contrary to settled evidentiary principles that apply generally in Mississippi state courts. In so doing, the Mississippi Supreme Court created a square conflict with the United States Court of Appeals for the Fifth Circuit (the jurisdiction of which includes Mississippi) as well as with other federal and state courts. Moreover, in direct conflict with *Shanklin*, the Mississippi Supreme Court held in the alternative that a change in circumstances at the crossing (*i.e.* the apparent absence at the time of the accident of a previously installed advance warning sign that it was the duty of the state highway

to maintain) effectively terminated federal preemption as to the railroad. This Court should grant certiorari in order to resolve these conflicts and to achieve national uniformity in the area of railroad safety.

A. Statutory And Regulatory Background

The safety of public railway-highway grade crossings[1] has long been a matter of federal concern. From the inception of the federal-aid highway program, Act of July 11, 1916, ch. 241, 39 Stat. 355, Congress has authorized federal funds for States to use in improving those crossings. From as early as 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e).[2]

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[1] A "public grade crossing" is an intersection of a railway and a public road at the same level. Federal R.R. and Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972) ("*1972 Crossings Report*").

[2] Such provisions served not only to protect motor vehicle drivers and passengers, but the railroads and their passengers: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from the dangers incident to motor transportation." *Nashville, Chattanooga, & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted) (discussing grade crossings); *see also Prevention of Rail-Highway Grade-Crossing Accidents Involving Ry. Trains and Motor Vehicles*, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

In 1970, Congress, troubled by the inadequacy of haphazard state regulation of railroad safety,[3] enacted the FRSA, Pub. L. No. 91-458, 84 Stat. 971.[4] The purpose of the FRSA was "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress vested the Secretary of Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Shanklin*, 529 U.S. at 348. In the FRSA's pre-emption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, it only permitted States to "adopt or continue in force a[ny] law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Shanklin*, 529 U.S. at 347-48.

The Secretary's mandated report to Congress[5] emphasized the need for passive warning devices at public crossings even

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[3] *See* H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

[4] The FRSA was originally codified at 45 U.S.C. §§ 421 to 444. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See Id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

[5] Section 433 of FRSA, in addition to requiring the Secretary to undertake solutions to the grade crossing problem pursuant to his authority under existing law, mandated that the Secretary submit to the President for

where active devices (such as gates and flashing lights) were not justified and recommended to Congress that it expand federal funding to the States to install protective devices at public crossings. See *1972 Crossings Report* at ii-iii. In response to the Secretary's report, Congress enacted section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283.[6] This statute specifically grants States federal funds "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a). To secure funds, States must "conduct and systematically maintain a survey of all highways" to identify crossings in need of safety improvements, and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d). This federal-state program is known as the Section 130 Crossing Program.

Soon after the passage of the 1973 Act, the FHWA promulgated regulations to govern federal aid projects "for the elimination of hazards of railroad-highway crossings." 23 C.F.R. § 646.200(b).[7] In addition to the general regulations governing state programs for evaluating railway crossing hazards and developing remedial projects, see 23 C.F.R. pt. 924, the FHWA made States "subject to further regulations governing the use of particular warning devices." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 666-67 (1993).

Among those regulations is a rule prescribing what will constitute "[a]dequate warning devices" and specifying that where "[f]ederal-aid funds participate in the installation of the

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transmittal to Congress a comprehensive study of the grade crossing program, together with his recommendations for eliminating and protecting railroad crossings. 45 U.S.C. § 433 (repealed 1994).

[6] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

[7] The Secretary delegated his statutory power to administer those Acts to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

devices" at rail-highway crossings specified devices must be installed or the project approved by FHWA. 23 C.F.R. § 646.214(b)(3)-(4) (emphasis omitted). No federal funds may be expended until there is compliance with all federal regulations, including § 646.214. See 23 C.F.R. § 630.106(a).

B. This Court's Decisions In *CSX Transportation, Inc.* v. *Easterwood* And *Norfolk Southern Railway* v. *Shanklin.*

In *CSX Transportation, Inc.* v. *Easterwood*, this Court declared that the federal regulations defining "adequate warning devices" in 23 C.F.R. § 646.214(b)(3) and (4) did "cover[] the subject matter of," 49 U.S.C. § 20106, state tort law requiring due care in the selection of warning devices. 507 U.S. at 670.[8] Sections 646.214(b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Id.*

The Court accordingly stated a bright-line test for federal preemption:

> In short, *for projects in which federal funds participate in the installation of warning devices*, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

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[8] FRSA pre-emption applies to any rule, regulation, or standard issued by the Secretary of Transportation that relates to railroad safety, and not just those issued under the authority of the FRSA. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 n.4 (1993). As this Court noted in *Easterwood*, however, 23 C.F.R. § 646.214(b)(3) and (4) were promulgated in part under the FRSA. *Id.*

Id. at 671 (emphasis added). The *Easterwood* Court found no preemption in the case before it only because the regulations did not apply: *i.e.*, federal funds did not participate in the installation at the crossing in question, *id.* at 673, and it was not contended that the project was part of a federal-aid highway project, *id.* at 670 n.10.

Because lower courts could not agree on how to apply the *Easterwood* bright-line rule, this Court clarified the rule in *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000). In *Shanklin*, the lower court had determined that the plaintiff's inadequate warning device claim was not preempted by Sections 646.214(b)(3) and (4), despite being presented with evidence that federal funds had been used to install warning devices at the intersection in question, because there was no evidence that the state had conducted a diagnostic study of that intersection and because federal funding of "'minimum protection'" did not indicate that the FWHA had conducted an "individualized determination of adequacy." *Id.* at 351. This Court rejected each of these claims and concluded that preemption of relevant state tort law claims is final, complete, and permanent from the time that federally funded warning devices are installed at a given intersection.

Reaffirming its holding from *Easterwood*, the Court emphasized "that the requirements spelled out in (b)(3) and (4) are *mandatory* for all warning devices installed with federal funds." *Id.* at 353. Thus, for *any* devices installed with federal funds, either "§ 646.214(b)(3) or (4) 'is applicable' and determines the type of warning device that is 'adequate' under federal law." *Id.* at 354. Therefore, "once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating," state law, including state tort law, is preempted. *Id.*

Shanklin contained three discrete holdings based on this conclusion. First, it specifically rejected the claim that preemption only occurs "where the warning devices have

been selected based on diagnostic studies and particularized analyses of the conditions at the crossing." *Id.* at 355-56. Second, it concluded that preemption is appropriate for crossings that are allegedly "[u]nder the 'minimum protection' program [such that] States obtain federal fund[ing] merely to equip crossings with advance warning signs and reflectorized crossbucks . . . without any judgment as to whether the signs are adequate." *Id.* The regulations have no exceptions for either devices installed without a diagnostic study or for "minimum protection" devices; rather, they cover *any* crossing at which federal funds are used to install *any* warning devices. Third, it made clear that preemption is final and permanent at the time of the installation regardless of whether subsequent developments have affected the safety of the crossing—"[w]hether the State should have originally installed different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Id.* at 358.

Under *Shanklin*, the crossing is federalized and the duty of maintaining the safety of the crossing belongs exclusively to the State and the FHWA under the Section 130 Crossings Program. However, "[w]hat the States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." *Id.*

C. This Litigation

On July 18, 1995, respondent J.C. Johnson was injured in an accident at the Johnson Quarters Road crossing in Pelahatchie, Rankin County, Mississippi, involving his automobile and one of petitioner KCS's trains. J.C. Johnson, joined by his wife, respondent Kerry Lynn Johnson, filed a state court complaint asserting various tort claims against KCS and the engineer who was operating KCS's train at the time of the accident. One of respondents' tort claims asserted

that KCS was negligent in failing to install active signalization at the Johnson Quarters Road crossing.

On January 23, 1998, KCS moved for partial summary judgment as to the adequate signalization claim on the grounds that the claim was preempted by federal and state law because traffic control devices had been installed with federal funds at the crossing. In support of that motion, KCS filed a sworn and notarized affidavit from Newton McCormick, Jr. ("McCormick"), then State Rail Engineer of the Rails Division of the Mississippi Department of Transportation ("MDOT"). In his affidavit, McCormick attested that he had personal knowledge of the use of federal funds in erecting warning signs on crossings over KCS's tracks and that, in 1981-83, federal funds were used to install an advance warning sign and inventory marker at the Johnson Quarters Road crossing. McCormick also attested that the FHWA approved both the use of federal funds at the Johnson Quarters Road crossing and the actual installation of the advance warning sign at that crossing. McCormick attached to his affidavit documentation establishing that the Johnson Quarters Road Crossing, DOT identification 305120L, received both an inventory marker and an advance warning sign. KCS specifically relied on McCormick's affidavit in both its motion for summary judgment and its itemization of undisputed material facts, filed pursuant to Miss. Cir. & Cty. Ct. R. 4.03(2).[9]

Respondents did not dispute the facts asserted in McCormick's affidavit and relied upon by KCS at summary judgment. Indeed, respondents filed *no* Rule 4.03(2) response to KCS's itemization of undisputed facts. Notwithstanding

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[9] Rule 4.03(2) reads, in relevant part: "Movants for summary judgment shall file with the clerk as a part of the motion an itemization of the facts relied upon and not genuinely disputed and the respondent shall indicate either agreement or specific reasons for disagreement that such facts are undisputed and material."

these undisputed facts, the trial court denied KCS's motion for partial summary judgment. App. 18a-19a.

At trial, respondents called McCormick as a witness. On cross-examination, McCormick testified, consistently with his affidavit, that federal funds were spent on placing an advance warning sign at the Johnson Quarters Crossing; he also testified that the only funds used by the State to put up warning devices were federal funds. See Trial Tr. at 149-50.[10] Respondents again failed to dispute McCormick's testimony regarding the federal funding for signage at the Johnson Quarters Crossing. Notwithstanding this undisputed testimony, the trial court submitted the case—including the inadequate signalization claim—to the jury, which found for the respondents in the amounts of $2.5 million for J.C. Johnson and $1.0 million for Kerry Lynn Johnson.

The trial court denied KCS's motion for judgment notwithstanding the verdict or, alternatively, for new trial as to liability and as to the amount of damages awarded to J.C. Johnson. Kerry Lynn Johnson ultimately accepted remittitur of her damages to $500,000 after the trial court concluded that her verdict was influenced by bias and passion. KCS filed a timely appeal of the judgment.

D. Decision Of The Mississippi Supreme Court

A central issue before the Mississippi Supreme Court was federal preemption of the inadequate warning-device claim. KCS placed before the court the undisputed evidence that federal funds were used to place an advance warning sign at the Johnson Quarters Road crossing. Despite this undisputed evidence, as well as this Court's intervening decision in *Shanklin*, the Mississippi Supreme Court affirmed the trial court.

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[10] Notably, the trial court overruled respondents' objection to McCormick's qualifications to testify as to what the federal government did relative to rail safety. Trial Tr. at 148.

The court rejected KCS's federal preemption claim due to an alleged lack of evidence that federal funds were spent on warning devices at the Johnson Quarters Road crossing. See App. 7a. Even though KCS brought its preemption claim on the basis of the federal funding of the installation of an advanced warning sign, as McCormick testified, the court, examining the evidence of record regarding crossing conditions at the time of the accident, rejected preemption because it found no evidence of any sign at the crossing other than a cross-buck (the traditional X-shaped sign with the words "RAILROAD CROSSING" on crossing boards). *Id.* Alternatively, the Court dismissed McCormick's affidavit and testimony as insufficient proof that federal funds participated in the installation of advance warning signs at the crossing, stating:

> KCS would like us to rely on the memory of one retired MDOT employee who claims to remember federal funds being spent at this particular crossing. We will not rule that federal funds have been spent where no documentation was produced in support thereof.

Id.[11]

KCS filed a timely motion for rehearing on the ground that the Mississippi Supreme Court's preemption analysis conflicted with this Court's decisions in *Easterwood* and *Shanklin* and that its rejection of McCormick's affidavit and testimony conflicted with both other courts and with Mississippi state law on statements made under oath. On May 10, 2001, the Mississippi Supreme Court denied without comment the motion for rehearing. App. 18a.

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[11] The court's rejection of KCS's documentary proof is most curious, as the documentation attached to McCormick's affidavit includes not only a listing of devices installed at this and other crossings, but also includes the federally funded project number—RRP-0061(4). McCormick Aff. at Ex. A (R. 408-09).

REASONS FOR GRANTING THE PETITION

Due to respondents' failure to dispute McCormick's testimony, either at summary judgment or at trial, this case presents an unusually clean set of facts for deciding the important federal law questions presented. This case is not the first one involving a lower court that has attempted to evade the strictures of federal preemption under the FRSA. Indeed, in *Norfolk Southern Railway* v. *Shanklin*, this Court rejected a statutory construction adopted by two circuit courts that "contradict[ed] the . . . plain text" of 23 C.F.R. § 646.214(b)(3) and (4). 529 U.S. 344, 356 (2000).

This case, however, presents questions that are significant not only in the area of railway safety regulation, an area in which national uniformity is both necessary and mandated by federal statute, 49 U.S.C. § 20106, but also for all other areas of federal preemption which require factual findings. First, this Court should grant certiorari in order to resolve whether state courts may create and apply special, heightened evidentiary rules in federal preemption cases, rules which in many instances will nullify legitimate preemption defenses and create undue variation from state to state. Second, this Court must also reaffirm its rule in *Shanklin* that federal preemption of a railroad's state-law duty to provide adequate warning devices at crossings is forever preempted when the crossing is federalized under the Section 130 program by the installation of warning devices with federal funds. The rule established by the Mississippi Supreme Court that a subsequent change in circumstances (such as a missing sign) deprives the railroad of a preemption defense, and reimposes state law duties of care, creates chaos for railroads. Particularly given that, in Mississippi as elsewhere, the State, rather than the railroads, has the responsibility to inspect and maintain signs on highway approaches to crossings, railroads will have no notice of when they are subject to state law or not, and no practical ability to ensure that the federal

protections created by FRSA and the FHWA regulation are preserved.

I. THE IMPOSITION OF SPECIAL EVIDENTIARY REQUIREMENTS TO ESTABLISH THE FEDERAL DEFENSE OF *EASTERWOOD* PREEMPTION CONFLICTS WITH THE DECISIONS OF THE FIFTH CIRCUIT AND OTHER COURTS.

In rejecting KCS's federal preemption defense, the Mississippi Supreme Court dismissed uncontradicted testimony, supported by documentation and establishing that federal funds were used to install an advance warning device at the Johnson Quarters Road crossing. Indeed, respondent failed to challenge McCormick's testimony that (1) he had personal knowledge of the use of federal funds to install the warning device at issue,[12] (2) that federal funds were, in fact, used to install the device, and (3) that documentation confirmed that the federal funds were used to install the device. Similarly, the trial court made no finding rejecting any of McCormick's testimony or concluding that it was not credible; indeed, the trial court *overruled* respondent's objection that McCormick was unqualified to testify as to the federal government's actions "relative to railroads." Trial Tr. at 148.

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[12] In addition to averring in his affidavit that he had personal knowledge of the federal funding of the relevant warning device and to testifying at trial as to his extensive experience as state rail engineer for the State of Mississippi with federal funding of warning devices, *see* Trial Tr. at 141-42, McCormick specifically testified at trial that he participated in the diagnostic team which evaluated the very crossing at issue in this case and which determined what warning devices to place at that crossing, *see id.* at 151-52. Thus, even if it was appropriate—which it was not—for the Mississippi Supreme Court to engage in a *post hoc* evaluation of McCormick's credibility, the clear, undisputed evidence in this case is that McCormick's testimony was more than amply supported by his personal knowledge.

Notwithstanding the lack in the trial record of either evidence or credibility conclusions undermining McCormick's testimony, the Mississippi Supreme Court chose to disregard that testimony. After first misstating the standard for FRSA preemption, it dismissed McCormick as "one retired MDOT employee who claims to remember federal funds being spent at this particular crossing." App 7a.[13] It then incorrectly asserted that KCS had failed to produce documentation in support of its claim that federal funds had been used to install a warning signal at the Johnson Quarters Road crossing—despite the fact that McCormick *had* attached to his affidavit documentation fully supporting his testimony.

The Mississippi Supreme Court's disregard of McCormick's testimony squarely conflicts with the treatment accorded by many other courts to similar evidence. Indeed, in a strikingly similar case, the Fifth Circuit concluded that an affidavit from McCormick—the same witness as in this case—similarly supported by MDOT records is ample evidence to "establish[] that federal funds did in fact participate in the installation of warning devices" at a given crossing. *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995). Similarly, the Southern District of Mississippi, subsequently affirmed by the Fifth Circuit, granted summary judgment as to an inadequate warning-device claim on federal preemption grounds where the defendant submitted an affidavit based solely on McCormick's personal knowledge that federal funds had been used to install a crossbuck at a given crossing. See *Williams* v. *CSX Transp., Inc.*, 925 F. Supp. 447, 451 (S.D. Miss. 1996) (also rejecting counter-evidence that a similar warning device was in place prior to the federally funded project), *aff'd without opinion*, 139 F.3d

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[13] KCS notes that, not only is there no support for the claim that retirement disqualifies a witness from testifying, McCormick's affidavit makes clear that he was *not* retired at the time that he attested to the facts at issue in this case. *See* McCormick Aff. at 1.

899 (5th Cir. 1998). In addition to conflicting with the Fifth Circuit, and thereby, with the federal courts throughout the State of Mississippi,[14] the Mississippi Supreme Court decision also conflicts with numerous other courts that have concluded that similar affidavits, accompanied by similar documentation, are sufficient to establish that federal funds were used to install warning devices at relevant rail-highway crossings. See, *e.g.*, *O'Bannon* v. *Union Pac. R.R.*, 169 F.3d 1088, 1090 (8th Cir. 1999); *Bryan* v. *Norfolk & W. Ry.*, 154 F.3d 899, 903 (8th Cir. 1998); *Cochran* v. *CSX Transp., Inc.*, 112 F. Supp. 2d 733, 737-38 (N.D. Ind. 2000); *Powers* v. *CSX Transp., Inc.*, 97 F. Supp. 2d 1297, 1299 (S.D. Ala. 2000); *McDaniel* v. *Southern Pac. Transp.*, 932 F. Supp. 163, 167 (N.D. Tex. 1995).

Beyond conflicting with the Fifth Circuit and other courts, the Mississippi Supreme Court's treatment of McCormick's affidavit is contrary to its own evidentiary law, and thus, constituted an impermissible and burdensome new rule specially created to be applied to federal preemption under FRSA and Section 646.214(b)(3) and (4). Under Mississippi

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[14] As the Mississippi Court of Appeals noted in *Pearson* v. *Columbus & Greenville Railway*, "[i]t is unnecessarily disruptive to apply a different interpretation of a federal statute in state court than is applied in our state's federal courts, at least when the interpretation is reasonable." 737 So. 2d 390, 397 (Miss. Ct. App. 1998). The wisdom of that statement is well-illustrated in this case, where the conflicting rulings of the Fifth Circuit and the Mississippi Supreme Court means that the availability of federal preemption under FRSA will turn on the availability of a federal forum and that plaintiffs will choose the state forum solely to destroy preemption. If for no other reason, this Court should grant certiorari in order to resolve this unacceptable situation. *See, e.g.*, *Norfolk & W. Ry.* v. *Hiles*, 516 U.S. 400, 402-03 (1996) (stating that certiorari was granted in order to resolve circuit split between Illinois Appellate Court and other courts, including the Seventh Circuit, regarding application of the Safety Applicance Act).

Rule of Civil Procedure 56(e),[15] affidavits considered at summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." In other contexts, the Mississippi Supreme Court has applied that standard to uphold summary judgment based on uncontradicted affidavits. See, *e.g.*, *Magee* v. *Transcontinental Gas Pipe Line Corp.*, 551 So. 2d 182, 186-87 (Miss. 1989) (state law negligence claim); see also *Koestler* v. *Mississippi Coll.*, 749 So. 2d 1122, 1126 (Miss. Ct. App. 1999). Indeed, under Mississippi law, in the absence of evidence (*e.g.*, prior inconsistent testimony under oath) that an affidavit is a sham, "[t]here should be a strong presumption of validity of anyone's statement under oath." *Mowdy* v. *State*, 638 So. 2d 738, 743 (Miss. 1994); see also *Templeton* v. *State*, 725 So. 2d 764, 768 (Miss. 1998). Similarly, Mississippi courts have long held that:

> Uncontradicted or undisputed evidence should ordinarily be taken as true by the triers of the facts. More precisely, evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or capriciously, discredited, disregarded, or rejected, even though the witness is a party or interested; and unless shown to be untrustworthy, is to be taken as conclusive, and binding on the triers of fact.

Lucedale Veneer Co. v. *Rogers*, 53 So. 2d 69, 75 (Miss. 1951) (en banc). Because McCormick's affidavit, like his trial testimony, meets all of the requirements of Rule 56(e), is

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[15] Notably, Mississippi Rule of Civil Procedure 56 is modeled after Federal Rule of Civil Procedure 56. *See* Comment, Miss. R. Civ. P. 56. This fact makes the conflict in this case even more significant, given that the various courts involved in the conflict are applying the same basic rule of law.

testimony taken under oath, and was both uncontradicted and "not so clearly lacking in trustworthiness to authorize its rejection," both the trial judge and the Mississippi Supreme Court should have "accept[ed] it as true" under Mississippi's normal evidentiary rules. *Reeves Royalty Co.* v. *ANB Pump Truck Serv.*, 513 So. 2d 595, 599 (Miss. 1987). Instead, the Mississippi Supreme Court inappropriately created a special evidentiary rule in order to preclude federal preemption.

By creating such a special evidentiary rule, the decision below not only conflicts with numerous courts, but also violates the core principle, consistently upheld by this Court, that "[a] state may not discriminate against rights arising under federal laws." *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934). This principle is contained in the Supremacy Clause of the United States Constitution, which expressly states that the United States Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Thus,

> [i]t must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity.

Hauenstein v. *Lynham*, 100 U.S. 483, 490 (1879). Accordingly, this Court has long accepted jurisdiction to prevent State courts from applying discriminatory rules to claims arising under federal law. See, *e.g.*, *Testa* v. *Katt*, 330 U.S. 386, 393 (1947) (reversing State court decision refusing to exercise jurisdiction over cause of action under federal act where the cause of action was within the scope of the State courts' authority). Of particular note is a series of cases addressing State courts' treatment of claims under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-59 ("FELA"). In

the FELA cases, this Court consistently rejected *discriminatory* treatment of claims grounded in federal law, while permitting those claims to be subject to *neutral* treatment pursuant to procedural rules of general application. Compare *McKnett*, 292 U.S. at 233-34 (rejecting special jurisdictional rule applied solely to FELA claims), and *Mondou* v. *New York, New Haven, & Hartford Ry.*, 223 U.S. 1, 57 (1912) (same) with *Missouri ex rel. S. Ry.* v. *Mayfield*, 340 U.S. 1, 4 (1950) (upholding general jurisdiction rule as applied to FELA claims), *Herb* v. *Pitcairn*, 324 U.S. 117, 123 (1945) (same), and *Douglas* v. *New York, New Haven, & Hartford R.R.*, 279 U.S. 377, 387-88 (1929) (same).

These principles are equally applicable to the defense of federal preemption—which is itself a means of enforcing the Supremacy Clause. *Mondou*, 223 U.S. at 54-55. Thus, just as this Court has refused to permit State courts to create special defenses applicable solely to a federal cause of action, *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 371 (1990), this Court should grant certiorari in this case in order to prevent States from creating special rules applicable solely to defenses created by federal law. In either case, "[t]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.*

* * * * *

The serious problems outlined above are exacerbated by the fact that the decision below will, as a practical matter, often preclude federal preemption under FRSA and Section 646.214(b)(3) and (4). That will certainly be the case in Mississippi: KCS in this case diligently sought all available project records from the MDOT and the local FHWA office and was provided all that apparently existed. Federal preemption and the railroad rights, duties, and liabilities cannot depend on the vagaries of state agency record retention from projects that may be decades old. If a court

may reject first-hand witness testimony that is accompanied by supporting documentation, it is hard to know how a railroad can prove preemption consistently in Mississippi and many other states.

Because some project records may no longer exist and other records may fall within the statutory exclusion from evidence of certain documents and testimony relating to evidence "compiled for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings," 23 U.S.C. § 409, permitting courts to reject testimony, such as that offered by McCormick in this case, will create an impermissible bar to federal preemption in contravention of express congressional intent.[16]

II. THE MISSISSIPPI SUPREME COURT'S HOLDING THAT *EASTERWOOD* PREEMPTION IS TERMINATED BY THE CHANGED CONDITIONS AT THE CROSSING IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *SHANKLIN*.

In an alternative holding, the court below inappropriately rejected federal preemption on the ground of changed circumstances. The court below stated that there were two warning devices that could potentially serve to trigger federal preemption under FRSA and 23 C.F.R. § 646.214(b)(3) and (4): namely, a crossbuck and an advanced warning sign separate from the crossbuck. App. 7a.[17] The court rightly

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[16] This case is not the first in which a State court has applied a heightened evidentiary standard in the context of FRSA preemption. *See Duncan* v. *Kansas City S. Ry.*, 773 So. 2d 670, 680 (La. 2000) (requiring that evidence establish the "unequivocal conclusion" that warning devices were installed with federal funds).

[17] The Federal Highway Administration's *Manual on Uniform Traffic Control Devices for Streets and Highways* lists railroad advanced warning signs as traffic control devices. *See* Federal Highway Admin., U.S. Dep't of Transp., *Manual on Uniform Traffic Control Devices for Streets and*

pointed out that there was no evidence that federal funds participated in the installation of the crossbuck, *id.*, but KCS has never attempted to demonstrate that the crossbuck was installed with federal funds or that it could serve as the basis for a preemption defense. Instead, as the court below acknowledged, KCS "consistently refer[red] to an advanced warning sign for which federal funds were spent." *Id.* KCS did so in reliance on McCormick's unequivocal and uncontradicted testimony, supported by project records, that an advanced warning sign was installed at the crossing with federal funds. Before even considering the sufficiency of McCormick's testimony, the Mississippi Supreme Court rejected KCS's claim of federal preemption as to the federally funded warning sign on the ground "there is no evidence of its existence" at the time of the accident. *Id.* Thus, the court below held in the alternative that, notwithstanding the uncontradicted evidence that the warning sign had previously been installed at the crossing with federal funds, the absence of the sign at the time of the accident precluded KCS from asserting a preemption defense.

The Mississippi Supreme Court's conclusory rejection of federal preemption on the ground of changed circumstances directly conflicts with this Court's holding in *Shanklin*. Assuming for the sake of argument that the court below was correct in concluding that the sign may not have existed at the time of the accident, it was flatly incorrect in treating that alleged fact as relevant to the federal preemption analysis under FRSA and Section 646.214(b)(3) and (4). To the contrary, this Court in *Shanklin* specifically held that federal preemption is triggered at the time that warning devices are installed at a given crossing using federal funds and cannot lapse thereafter. 529 U.S. at 359. Thus, "whether conditions at the crossing have since changed . . . is immaterial to the

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Highways § 8B-3 (1988) ("*MUTCD*"). Notably, *Shanklin* involved similar advanced warning signs, as well as reflectorized crossbucks. 529 U.S. at 350.

pre-emption question," *id.* at 358. The installation of federally funded devices federalizes the crossing and shifts the duty to ensure adequate devices to the State and the FHWA under the Section 130 program and permanently preempts the railroad's former tort-law duties: "[w]hat States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." *Id.* By rejecting federal preemption on the ground that even if—as is the case—the evidence established that federal funds were used to install an advanced warning sign at the Johnson Quarters Road, that sign may no longer exist, the court below blatantly contravened the rule in *Shanklin*. This Court should grant certiorari in order to make clear that, like with other changed circumstances claims, changes in the conditions of the crossing (such as the absence of warning devices that were previously installed) are not relevant to federal preemption analysis under FRSA and Section 646.214(b)(3) and (4).

Beyond demonstrating an unwillingness to follow this Court's binding precedent,[18] the decision below also undermines federal law and the purposes underlying FRSA

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[18] The Mississippi Supreme Court's refusal to correct language suggesting, in direct conflict with *Shanklin*, that federal preemption only occurs at high-risk crossings where active devices have been installed after diagnostic study likewise demonstrates disregard for this Court's holding. Citing to *Pearson* v. *Columbus & Greenville Railway*, 737 So. 2d 390 (Miss. Ct. App. 1998), the Mississippi Supreme Court stated that "[b]efore federal law will preempt a state law there must be proof that federal-aid funds were used in the installation of devices *including automatic gates with flashing light signals when one or more of several conditions exist*." App. 7a (emphasis added). This statement of law, which clearly conflicts with *Shanklin*, 529 U.S. at 355-56, underlies the Mississippi Supreme Court's ultimate decision to disregard McCormick's uncontradicted testimony. Indeed, despite being informed in KCS's motion for rehearing that its decision conflicts with *Shanklin* and with numerous courts, the Mississippi Supreme Court declined the opportunity to remedy, or even to address, these conflicts.

preemption of state law. Congress has expressly stated that a major purpose of FRSA and its accompanying regulations is to compel "national[] uniform[ity]" in the area of railroad safety where the Secretary of Transportation (acting through the FHWA) has established federal rules and standards. 49 U.S.C § 20106. Where federal standards are in place, preemption preserves the ability of railroads to operate in interstate commerce without being subject to the vagaries of variable state laws. Additionally, the Section 130 Crossings Program is a voluntary program that provides funding for railway-crossing warning devices while simultaneously giving states the duty to maintain those warning devices and removing the states' ability to "hold the railroad responsible for the adequacy of those devices." *Shanklin*, 529 U.S. at 358. To avoid these consequences, a state can refuse to participate in the Section 130 Crossings Program, but participation in the program is tantamount to acceptance of the Program's attendant duties and consequences.

As this Court made clear in *Shanklin*, in light of the State's ongoing duty to survey crossings and to devise projects to eliminate hazards, 23 U.S.C. § 130(d), "nothing prevents a State from revisiting the adequacy of devices installed using federal funds. States are free to install more protective devices at such crossings with their own funds or with additional funding from the FHWA." 529 U.S. at 358. Moreover, as in many other states, Mississippi state law obligates state and local authorities—not the railroads—to maintain traffic-control devices, like the railway warning device at issue in this case. See Miss. Code Ann. §§ 63-3-303, -305; see also *MUTCD* § 1A-3 ("The responsibility for the design, placement, operation and maintenance of traffic control devices rests with the governmental body or official having jurisdiction.").

If FRSA preemption turns on whether warning devices have been appropriately maintained, every railroad will be burdened with having to ensure on a constant basis that every

state or local authority has fulfilled its obligations to maintain the federally funded warning devices at every crossing in the railroad's system. It would be senseless and wasteful to impose a duplicative duty on railroads to inspect crossings (and the highway approaches to them); moreover, railroads have no power to compel the state or local government agency to supply needed signs on public roads, nor to install them independently. See *MUTCD* § 1A-3.1 ("Traffic control devices shall be placed only by the authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic."); see also Miss. Code Ann. §§ 63-3-303, -305 (giving authority to place and maintain traffic control devices solely to state and local authorities). It would be doubly senseless if the railroad's legal duties (and tort liability) turns on such happenstance as whether the state or locality has timely inspected or replaced missing signs.

Thus, if the Mississippi Supreme Court decision is permitted to stand, it will not only undermine the national uniformity in railway safety regulation expressly required by Congress, but it will also unfairly shift to the railroads enormous burdens that federal and, in many cases, state law allocate to the states and localities.

* * * * *

Despite Congress's express policy decision that federal funding of safety devices and accompanying federal preemption of state law is the best means to effect railway safety, some courts continue to try to evade the FRSA's preemptive effect. This Court should grant certiorari both to make clear that *Shanklin*'s holding regarding changed circumstances applies to claims that warning device were not properly maintained and to put a stop to the continued efforts to undermine FRSA and its accompanying regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 16, 2001

APPENDICES

APPENDIX A

SUPREME COURT OF MISSISSIPPI

No. 1999-CA-00505-SCT

KANSAS CITY SOUTHERN RAILWAY COMPANY, INC.,

v.

J.C. JOHNSON AND KERRY LYNN JOHNSON.

Feb. 8, 2001

Before PITTMAN, C.J., SMITH and DIAZ, JJ.

SMITH, JUSTICE, FOR THE COURT:

On the Court's own motion, the prior opinions issued in this case are withdrawn, and this opinion is substituted therefor.

Kansas City Southern Railway appeals to this Court from a jury verdict rendered in Hinds County Circuit Court in favor of J.C. Johnson in the amount of $2.5 million and $1 million for Kerry Lynn Johnson. Judgment was entered based on the verdict. KCS subsequently moved for a judgment notwithstanding the verdict or a new trial. The circuit court denied this motion but ordered a remittitur of $500,000 on the damage award to Kerry Lynn Johnson. The remittitur was accepted. KCS promptly perfected this appeal.

This Court holds that the jury was properly instructed regarding damages for loss of enjoyment of life recoverable as a separate form of damages. We further hold that the trial court properly allowed the testimony of plaintiff's expert witness, Dr. Stan Smith. We therefore affirm the trial court.

STATEMENT OF THE FACTS

Viewed in the light most favorable to the Johnsons, the facts are as follows. On July 18, 1995, the vehicle driven by J.C. Johnson ("Johnson") was struck by KCS's eastbound 40-mile-per-hour freight train operated by its engineer, Cook. Before turning off to his right from U.S. Highway 80 some 68 feet north of the railroad crossing, Johnson had been traveling east on Highway 80, heading parallel with and in the same direction as the train, which, unknown to Johnson, was overtaking him from behind.

As Johnson headed up the steep, rough roadway slope of Johnson Quarters Road to the humpbacked summit of the crossing, unable to see oncoming vehicles on the other side of the tracks because of the severe grade, his view both up and down the tracks was seriously impaired by trees, bushes and other vegetation growing on KCS's right-of-way, which extended out 50 feet on either side of the track. There were no flashing lights or gates, or any other form of active protection, to warn motorists that a train was approaching this crossing at about 60 feet per second.

KCS's conductor seated on the left side of the locomotive cab testified that he saw Johnson as he turned off Highway 80 onto Johnson Quarters Road, when the train was about 300 feet away from impact. The engineer on the right side of the cab never saw Johnson's truck until somewhere between 100 to 150 feet. There was evidence that the train's horn was blown before the collision, but it was alleged that KCS's engineer had failed to blow his horn at a sufficient distance away from the crossing to give Johnson adequate warning that the 40 mph (60 feet per second) train was coming.

It is also alleged that KCS had not maintained the crossing nor adopted any reasonable policy relative to vegetation control to provide a clear sight distance to the motoring public to detect approaching high speed trains. As a result of

the railroad's negligence, in both crossing maintenance and train operation, Johnson contends he sustained severe and permanent injuries, consisting of a closed-head injury which has left him little more than a child. Johnson had a long history of employment and alleges he has suffered significant economic loss and medical expenses. Additionally, his wife suffered substantial loss of consortium.

After hearing the evidence, the jury found in favor of the Johnsons. KCS appeals to this Court and presented a number of issues for discussion.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRED IN REFUSING TO TRANSFER VENUE TO THE CIRCUIT COURT OF RANKIN COUNTY.

II. WHETHER THE CIRCUIT COURT ERRED IN DENYING KCS'S MOTIONS FOR A DIRECTED VERDICT, PEREMPTORY INSTRUCTION, JUDGMENT NOTWITHSTANDING THE VERDICT, AND NEW TRIAL.

III. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY REGARDING HEDONIC DAMAGES.

IV. WHETHER THE CIRCUIT COURT ERRED IN ALLOWING RECOVERY OF HEDONIC DAMAGES.

V. WHETHER THE CIRCUIT COURT ERRED IN GRANTING NUMEROUS JURY INSTRUCTIONS.

DISCUSSION OF LAW

I. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN REFUSING TO TRANSFER VENUE.

The Johnsons filed the present action against KCS, Illinois Central, and Cook in the Circuit Court of Hinds County. The circuit court denied the defendants' motion to transfer venue to Rankin County. On appeal, KCS argues that the circuit court erred in denying the motion.

"An application for a change of venue is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case." *Beech v. Leaf River Forest Prods., Inc.*, 691 So.2d 446, 448 (Miss.1997) (quoting *Mississippi State Highway Comm'n v. Rogers*, 240 Miss. 529, 539-40, 128 So.2d 353, 358 (1961)). "The trial court must give the plaintiff the benefit of reasonable doubt with respect to the venue selection, and this Court must do the same on appeal." *Pisharodi v. Golden Triangle Reg'l Med. Ctr.*, 735 So.2d 353, 354 (Miss.1999) (citing *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1156 (Miss.1992)).

The railroad venue statute, Miss.Code Ann. § 11-11-5 (Supp.2000), provides as follows:

> Actions against any railroad . . . may be brought in the county where the cause of action accrued, in the county where the defendant has its principal place of business, or in the county in which the plaintiff resided at the time the cause of action accrued.

The cause of action in this case accrued in Rankin County, and the Johnsons resided in Rankin County. KCS argues that because its principal place of business is in Kansas City,

Missouri, and not in Hinds County, the circuit court improperly denied its request to transfer venue to Rankin County. The Johnsons assert that KCS's principal place of business is in Hinds County, its registered agent for service of process, as well as Illinois Central's principal place of business and its registered agent for service of process. KCS, however, denies this despite the fact that one of its employees testified that the main office of the railroad was located in Jackson.

In *Sawyer v. Illinois Cent. Gulf R.R.*, 606 So.2d 1069 (Miss.1992), this Court held that for purposes of the railroad venue statute, the principal place of business of Illinois Central was in Hinds County. In *Salts v. Gulf Nat'l Life Ins. Co.*, 743 So.2d 371, 374 (Miss.1999), this Court explained:

> In suits involving multiple defendants, where venue is good as to one defendant, it is good as to all defendants. This is true where the defendant upon whom venue is based is subsequently dismissed from the suit. In such situations, venue as to the remaining defendants continues despite the fact that venue would have been improper, if the original action had named them only.

KCS argues that this rule does not apply in the case at hand because the Johnsons' claim against Illinois Central was filed frivolously to establish venue in Hinds County. KCS's argument is not well-taken. After careful review, we find that venue was proper. The trial court had before it evidence that KCS's principal place of business was in Hinds County. We cannot say the trial court abused its discretion in denying the motion to transfer venue. Accordingly, this issue is without merit.

II. WHETHER THE CIRCUIT COURT ERRED IN DENYING KCS'S MOTIONS FOR A DIRECTED VERDICT, PEREMPTORY INSTRUCTION, JUDGMENT NOTWITHSTANDING THE VERDICT, AND NEW TRIAL.

This Court's standards of review for a denial of a judgment notwithstanding the verdict, a directed verdict, and a peremptory instruction are identical:

> Under this standard, this Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Steele v. Inn of Vicksburg, Inc., 697 So.2d 373, 376 (Miss.1997). The trial judge properly denied the above motions, and the arguments that we should find otherwise are not persuasive. Evidence as to the hazardous conditions of the crossing as well as the adequacy of the sight distance were clearly questions for the jury.

KCS also claims that it would be proper to grant a new trial in light of the evidence in their favor and due to preemption of federal law. We disagree. This Court will reverse a trial court's denial of a request for new trial only when the denial amounts to a abuse of that court's discretion. *Id.* at 376 (citing *Shields v. Easterling*, 676 So.2d 293, 298 (Miss.1996); *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n*, 560 So.2d 129, 132 (Miss.1989)). The same arguments used in the paragraph

above can be made here as to the weight of the evidence, but whether we should be preempted by federal law should be addressed.

KCS consistently refers to an advanced warning sign for which federal funds were spent. A careful examination of the record reveals nothing but the reflective, cross-buck. While it is unclear as to which sign KCS is referring, it makes no difference. If it is a sign other than the cross-buck there is no evidence of its existence. If KCS is referring to the reflective cross-buck, there is lack of proof that federal funds were spent on its installation.

KCS also claims that *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993); *Hester v. CSX Transp.*, 61 F.3d 382 (5th Cir.1995); and *Pearson v. Columbus & Greenville Ry.*, 737 So.2d 390 (Miss.Ct. App.1998), demonstrate that our laws are preempted by federal guidelines in this case. Again, we disagree. Before federal law will preempt a state law there must be proof that federal-aid funds were used in the installation of devices including automatic gates with flashing light signals when one or more of several conditions exist. *See* 23 CFR § 646.214(b) (2000).

Pearson stands for the proposition that there must be more than the existence of a plan in that the plan must also have been implemented. *Pearson*, 737 So.2d at 396. The court further stressed that mere expenditure of federal funds from whatever source or for whatever reason, does not trigger preemption. *Id.* KCS would like us to rely on the memory of one retired MDOT employee who claims to remember federal funds being spent at this particular crossing. We will not rule that federal funds have been spent where no documentation was produced in support thereof. There is no federal preemption in this case, and the matter is properly before this Court.

KCS also claims that Miss. Code Ann. §§ 63-3-303, 305 removes any and all responsibility from its shoulders and transfers the duty to the Mississippi Department of Transportation. Section 63-3-303 provides, in pertinent part:

> The commissioner of public safety and the state highway commission shall place and maintain such traffic-control devices conforming to its manual and specifications, upon all state and county highways as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic.

Section 63-3-305 states:

> Local authorities in their respective jurisdictions shall place and maintain such traffic control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or provisions of local traffic ordinances or to regulate, warn, or guide traffic.

Nevertheless, §§ 77-9-247 and 248 (discussing installation of cross-bucks), § 77-9-251 (discussing duty of railroad in maintaining the grade), § 77-9-245 (duty to enclose depots), and § 77-9-253 (duty to maintain stock gaps and cattle guards) clearly refer to duties of the railroad in the interest of public safety. This refutes the point that KCS has no duty toward the public in operation of its railroad. However, foreseeability and breach of duty are issues to be decided by the finder of fact once sufficient evidence is presented in a negligence case. *Lyle v. Mladinich*, 584 So.2d 397, 400 (Miss.1991).

III. WHETHER THE CIRCUIT COURT ERRED IN ALLOWING RECOVERY OF HEDONIC DAMAGES.

The loss of one's enjoyment of life continues to be an area of confusion in the state of Mississippi. The issue to be

decided here is whether our state will or will not recognize this type of recovery in a personal injury action, and if so to what extent? Jurisdictions around the country have chosen either; 1) not to recognize the loss of enjoyment of life, 2) recognize the loss of enjoyment of life as a completely separate element considered in addition to pain and suffering, or 3) recognize the loss of enjoyment of life but only as integrated into pain and suffering. *See e.g., Elliott v. United States*, 877 F.Supp. 1569 (M.D.Ga.1992); *Loth v. Truck-A-Way Corp.*, 60 Cal.App.4th 757, 70 Cal.Rptr.2d 571 (Cal.Ct.App.1998); *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783, 792 (Fla.1985) (recognizing as separate from pain and suffering); *Brookshire Bros., Inc. v. Wagnon*, 979 S.W.2d 343, 353 (Tex.Ct.App.1998) (recognizing as an element of pain and suffering); *Kirk v. Washington State Univ.*, 109 Wash.2d 448, 746 P.2d 285 (Wash.1987). Today we decide to follow the jurisdictions which recognize the loss of enjoyment of life.

The Court of Appeals has pointed out that there are no Mississippi cases directly on point on the question of whether loss of enjoyment of life is an element of damages in a survival personal injury action. *KM Leasing, Inc. v. Butler*, 749 So.2d 310 (Miss.Ct.App.1999). While we have not declared how to classify the loss of enjoyment of life, we have made clear that the damages to a particular plaintiff in a personal injury action should be decided on a case-by-case basis. *Kinnard v. Martin*, 223 So.2d 300, 302 (Miss.1969); *Mobile & Ohio R.R. v. Carpenter*, 104 Miss. 706, 61 So.2d 693 (1913); *Southern R.R. v. Kendrick*, 40 Miss. 374 (1866). We allowed recovery for all damages including those for partial loss of enjoyment of life in *W.J. Runyon & Son, Inc. v. Davis*, 605 So.2d 38, 50 (Miss.1992). This Court has also recognized damages for the loss of enjoyment of life in a number of other personal injury cases. *See Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1163 (Miss.1992) (recognized loss of enjoyment of life as a factor in determining jury award);

General Motors Corp. v. Jackson, 636 So.2d 310, 315 (Miss.1994) (holding award that included damages for loss of enjoyment of life not excessive); *Atwood v. Lever*, 274 So.2d 146, 149 (Miss.1973) (jury instruction on damages for loss of enjoyment of life recognized but found no facts in record to support award of damages based on loss of enjoyment of life.); *Haywood v. Collier*, 724 So.2d 1105, 1107 (Miss.Ct.App.1998).

Furthermore, we said that an injured plaintiff enjoys the right to damages such as will compensate him for all of his losses, past and future and is entitled to the present worth of all that has been forced upon him. *Davis*, 605 So.2d at 50. It was not, however, specified as to whether damages for loss of enjoyment of life were to be considered as part of or separate from those for pain and suffering.

The loss of enjoyment of life should be fully compensated and should be considered on its own merits as a separate element of damages, not as a part of one's pain and suffering. We decide to follow other jurisdictions which have held that damages for loss of enjoyment of life compensate the injured person for the limitations placed on his or her ability to enjoy the pleasures and amenities of life. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 715-16 (Tenn.Ct.App.1999) (citing *Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 824 (6th Cir.1980)). This type of damage relates to daily life activities that are common to most people. There are numerous activities that courts have held constitute daily life activities: going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities. *See generally Nemmers v. United States*, 681 F.Supp. 567, 575 (C.D.Ill.1988); *Dyer v. United States*, 551 F.Supp. 1266, 1281 (W.D.Mich.1982); *Sweeney v. Car/Puter Int'l Corp.*, 521 F.Supp. 276, 288 (D.S.C.1981); *Overstreet*, 4 S.W.3d at 716. Pain and suffering encompasses the physical and mental discomfort caused by an injury, such as anguish, distress,

fear, humiliation, grief, shame, and worry. *Overstreet*, 4 S.W.3d at 715. A permanent injury differs from pain and suffering in that it is an injury from which the plaintiff cannot completely recover. *Id.* (citing *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618, 630 (W.Va.1974)).

Evidence was presented at trial that prior to the accident Mr. Johnson enjoyed hunting, fishing, and yard work. As a result of the accident, Johnson suffered brain injury, a cracked pelvis, bruised lungs, pneumonia, and was forced to move to an inpatient rehabilitation center for close to a year. Johnson also testified as to his inability to enjoy those activities in which he participated prior to the accident. His wrist has been damaged and one of his fingers remains crooked. Furthermore, there is evidence that Johnson has a diminished ability to speak. We find that the testimony of Mr. Johnson, Ms. Johnson, the physical therapist, the rehab specialist, the speech therapist, are ample to support damages for Johnson's lost ability to enjoy his prior life style. Johnson has demonstrated that he is conscious of his lost enjoyment of life's pleasures, and our tort system should compensate him for these losses. Perhaps most telling about the effects of the accident on Johnson's life is this testimony from Johnson's daughter, Angela: "I watched an active man sit in a wheelchair all day. I watched an articulate man who took pride in his vocabulary struggle to get one word out. And I have watched a person that was always happy look sullen and sad, stare out into space."

It is apparent that Johnson is no longer the person he was prior to the accident. We hold today that these restrictions are significant enough to warrant compensation as a separate and distinct element of damages.

We believe jury instruction P-11A was correctly given. The instruction at issue reads as follows:

> The Court instructs the jury that "damages" is the word which expresses in dollars and cents the injuries sustained by a plaintiff. The damages to be assessed by a jury in a personal injury case *cannot be assessed by any* fixed rule, but you are the sole judges as to the measure of damages in any case. Should your verdict be for the plaintiffs, you may consider the following factors in determining the amount of damages to be awarded as may be shown by a preponderance of the evidence: . . . 5.) Loss of enjoyment of Life, and 6.) The value of past, present and future physical pain and suffering and resulting mental anguish, if any.

This instruction adequately separates loss of enjoyment of life damages from pain and suffering. The instruction was a simple, appropriate way to place before the jury the issue of loss of the enjoyment of life as a distinct and separate element of damages which cannot be considered as pain and suffering. The trial court did not err in granting this instruction.

IV. WHETHER THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY REGARDING LOSS OF ENJOYMENT OF LIFE.

At trial, KCS filed a motion *in limine* in an effort to exclude the testimony of Dr. Stan Smith. The claim was that an expert must have acceptance in the particular field to which it belongs, and, moreover, that the method by which his opinion was reached was not generally accepted in his field of expertise as required by M.R.E. 702. On appeal, KCS argues that the trial court erred in denying its motion *in limine*.

The admission of testimony is within the sound discretion of the trial court. *Roberts v. Grafe Auto Co.*, 701 So.2d 1093, 1098 (Miss.1997). Unless we conclude that the discretion was arbitrary and clearly erroneous, the decision will stand. *Id.*

(citing *Seal v. Miller*, 605 So.2d 240, 243 (Miss.1992); *Hooten v. State*, 492 So.2d 948, 950-51 (Miss.1986)).

Under Mississippi Rule of Evidence 702, expert testimony should be admitted only when the trial court can affirmatively answer a two-fold inquiry. First, the witness must be qualified as an expert because of the knowledge, skill, experience, training, or education he or she possesses. M.R.E. 702. *See also Watkins v. U Haul Int'l, Inc.*, 770 So.2d 970, 973 (Miss.Ct.App.2000). Second, the witness's scientific, technical, or other specialized knowledge must assist the trier of fact to understand or decide a fact in issue. *Id.* Rule 702 "does not relax the standard that the expert must indeed be qualified to speak an opinion on a matter within his alleged field of knowledge," nor does it "relax the requirement that the scientific principle from which the expert's opinion is derived 'must be sufficiently established to have gained general acceptance in the particular field to which it belongs'" M.R.E. 702 cmt. (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923)).

In *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court held that Federal Rules of Evidence 702 supersedes the former "general acceptance" test set forth in *Frye*. Mississippi, however, has not adopted the *Daubert* test, and continues to utilize the "general acceptance" test enumerated in *Frye* even after the adoption of Mississippi Rule of Evidence 702. *Gleeton v. State*, 716 So.2d 1083, 1087 (Miss.1998) (citing *Crawford v. State*, No. [sic] 716 So.2d 1028, 1046 (Miss.1998); *Polk v. State*, 612 So.2d 381, 390 (Miss.1992)).

In *Hooten v. State*, 492 So.2d 948 (Miss.1986), we reiterated the rule for expert witnesses stating, "it is not necessary that one offering to testify as an expert be infallible or possess the highest degree of skill; it is sufficient if that person possesses peculiar knowledge or information

regarding the relevant subject matter which is not likely to be possessed by a layman." *Id.* at 948 (citing *Henry v. State*, 484 So.2d 1012, 1015 (Miss.1986)).

Johnson contends that Smith's testimony assisted the trier of fact in determining the amount of loss suffered as a result of KCS's negligent conduct and thus meets the standards set forth in MRE 702 and *Frye*. We agree. Although there is some honest dispute as to whether Dr. Smith's testimony was generally accepted in his field, the question of whether the proffered witness had obtained the required degree of specialized knowledge within a particular field is a matter within the sound discretion of the trial court, and unless there is abuse of that discretion, his determination will not be disturbed on appeal. *Pharr v. Anderson*, 436 So.2d 1357, 1359 (Miss.1983) (collecting authorities).

The trial court did not abuse its discretion by allowing Dr. Smith to testify as he had qualified as an expert in over 100 cases. Three affidavits of noted economists were tendered opining that, "[c]alculations of loss of enjoyment of life damages are now widely accepted in the field of forensic economics." The railroad produced its own expert who testified that Dr. Smith's conclusions were unreliable, invalid, and speculative. It is the jury's duty to determine which expert's testimony is to be given the greater weight. We do not find today that the trial court abused its discretion by allowing this testimony.

CONCLUSION

Having held that damages for loss of enjoyment of life are recoverable as a separate form of damages, and that admission of the testimony of Smith was not error, we affirm the judgment of the trial court.

AFFIRMED.

PITTMAN, C.J., BANKS and McRAE, P.JJ., MILLS, WALLER, COBB, DIAZ and EASLEY, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

CAUSE NO. 96-90CIV

J.C. JOHNSON AND KERRY LYNN JOHNSON
Plaintiffs

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY
Defendant

ORDER

This cause having come on to be heard on Defendant Kansas City's Southern Railway Company's Motion For Judgment Notwithstanding the Verdict or a New Trial. And the Court, having considered said Motion finds the following:

1) The verdict of $2.5 million in favor of Plaintiff J.C. Johnson shall be upheld since it is supported by the evidence.

2) The $1 million verdict in favor of Plaintiff Kerry Lynn Johnson was influenced by bias and passion and was contrary to the overwhelming weight of the evidence presented at trail. This award shall be reduced to $500 thousand. This plaintiff shall have 30 days to accept or reject this remittitur. Should Plaintiff reject the remittitur, Plaintiff will be granted a new trial on the issue of damages only.

IT IS THEREFORE, ORDERED and adjudged that the Motion For Judgment Notwithstanding the Verdict is denied with regard to J.C. Johnson's judgment and sustained with

regard to Kerry Lynn Johnson's judgment as stated above. The Motion for New Trial is denied at this time.

THIS THE 4th day of March, 1999.

/s/ [Illegible]
Circuit Judge

APPENDIX C

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

Civil Action
File No. 251-96-90-CIV

J.C. JOHNSON,

Plaintiff,

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY, AND WILLIAM L. COOK, III,

Defendants.

ORDER OVERRULLING DEFENDANT'S SUMMARY JUDGMENT MOTION ON GROUNDS OF PREEMPTION

This day this cause coming on for hearing on Motion of Kansas City Southern Railway Company and William L. Cook, III for Partial Summary Judgment as to Plaintiffs' signalization claims, on the ground that such claim is preempted by federal law, and on the further ground that said claim is preempted by state law, and the court having considered the briefs of the parties, together with argument by counsel, and having taken the matter under advisement and now being fully advised in the premises, finds that the Motion is not well-taken on either ground and should be overruled.

WHEREFORE, PREMISES CONSIDERED, IT IS HEREBY ORDERED that the Defendants' Motion for Summary Judgment as to the signalization claim based on the

grounds of federal preemption and state law preemption be, and hereby is, overruled.

SO ORDERED on this the 4th day of June 1998.

/s/ [Illegible]
Circuit Judge

APPENDIX D

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Court of Appeals of the State of Mississippi
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May 10, 2001

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 10th day of May, 2001.

Supreme Court Case # 1999-CA-00505-SCT
Trail Court Case # 2519690

Kansas City Southern Railway Company, Inc. v. J.C. Johnson and Kerry Lynn Johnson

Appellant's motion for rehearing is denied.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS*

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

APPENDIX E

STATUTES AND REGULATION

23 U.S.C. § 109. Standards

* * * *

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

* * * *

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 894; Pub.L. 88-157, § 4, Oct. 24, 1963, 77 Stat. 277; Pub.L. 89-574, §§ 5(a), 14, Sept. 13, 1966, 80 Stat. 767, 771; Pub.L. 91-605, Title I, § 136(a), (b), Dec. 31, 1970, 84 Stat. 1734; Pub.L. 93-87, Title I, §§ 114, 152(2), 156, Aug. 13, 1973, 87 Stat. 257, 276, 277; Pub.L. 95-599, Title I, §§ 113, 116(d), 141(f), (g), Nov. 6, 1978, 92 Stat. 2696, 2699, 2711; Pub.L. 96-106, § 3, Nov. 9, 1979, 93 Stat. 797; Pub.L. 97-424, Title I, § 110(a), Jan. 6, 1983, 96 Stat. 2105; Pub.L. 102-240, Title I, § 1016(c) to (f)(1), Dec. 18, 1991, 105 Stat. 1946; Pub.L. 104-59, Title III, §§ 304, 305(a), Nov. 28, 1995, 109 Stat. 579, 580; Pub.L. 105-178, Title I, §§ 1202(c), 1212(a)(2)(A), 1306, June 9, 1998, 112 Stat. 170, 193, 229.)

23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings,

the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after

completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States.

The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway[1] crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

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[1] So in original. Probably should be "railroad-highway".

(i) Incentive payments for at-grade crossing closures.—

(1) In general.—Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.—A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.—The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of—

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.—A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.—In carrying out projects under this section, a State shall take into account bicycle safety.

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159; Pub.L. 104-59, Title III, § 325(a), Nov. 28, 1995, 109 Stat. 591; Pub.L. 104-205, Title III, § 353(b), Sept. 30, 1996, 110 Stat. 2980;

Pub.L. 105-178, Title I, §§ 1111(d), 1202(d), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 146, 170, 193.)

23 U.S.C. § 409. Discovery and admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[1] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170; Pub.L. 102-240, Title I, § 1035(a), Dec. 18, 1991, 105 Stat. 1978; Pub.L. 104-59, Title III, § 323, Nov. 28, 1995, 109 Stat. 591.)

49 U.S.C. § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

---

[1] Probably should have a comma inserted.

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 866.)

23 C.F.R. § 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices*, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[40 FR 16059, April 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

Supreme Court, U.S.
FILED
JUL 2001
OFFICE OF THE CLERK

No. 00-1718

IN THE
Supreme Court of the United States

KANSAS CITY SOUTHERN RAILWAY COMPANY, INC.,
Petitioner,

v.

J.C. JOHNSON AND KERRY LYNN JOHNSON,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Mississippi

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24 pp

QUESTION PRESENTED

In this case, a jury found the defendant railroad liable for damages on the ground that its negligence caused a grade-crossing collision in which the plaintiff sustained severe and permanent brain injuries. The question presented is:

> Should this Court grant review to decide whether the Mississippi Supreme Court erred in affirming the trial court's finding that the railroad failed to produce sufficient evidence that federal funding participated in the installation of a grade-crossing sign to justify preemption of the plaintiff's claim under the Federal Railroad Safety Act (FRSA), where:
>
> (1) the principal evidence on which the railroad now relies as proof of federal funding was not a subject of the railroad's appeal, and thus was never passed on by the Mississippi Supreme Court;
>
> (2) the Mississippi Supreme Court ruling as to the sufficiency of the evidence was one of Mississippi law;
>
> (3) the parties and the Mississippi Supreme Court below all agree on the proper legal standard for determining whether the FRSA preempts the claim at issue; and
>
> (4) no other federal or state court has ever considered the question of evidentiary sufficiency decided by the Mississippi Supreme Court?

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STATEMENT OF JURISDICTION

Respondents agree that the petition was filed within 90 days of the final judgment of the Mississippi Supreme Court. However, for the reasons stated in Part I of "Reasons for Denying the Writ," *infra* at 4-13, the questions presented by petitioner do not contain a genuine federal question within the meaning of 28 U.S.C. 1257(a).

STATEMENT OF THE CASE

On July 18, 1995, a vehicle driven by respondent J.C. Johnson was struck by a freight train operated by petitioner Kansas City Southern Railway Company as Mr. Johnson proceeded through the Johnson Quarters Road railroad crossing in Rankin County, Mississippi. The evidence at trial showed that Mr. Johnson was traveling on a highway parallel to the railroad track in the same direction as petitioner's train, which, unknown to Mr. Johnson, "was overtaking him from behind." App. 2a. Mr. Johnson turned to the right and headed up a steep slope to the "humpbacked summit of the crossing[.]" *Id.* As he approached the crossing, Mr. Johnson's "view both up and down the tracks was seriously impaired by trees, bushes and other vegetation growing on [petitioner's] right-of-way . . .." *Id.* There were no flashing lights or other form of active protection at the crossing. Respondents alleged that the train's engineer failed to sound the horn sufficiently before the train arrived at the crossing to warn Mr. Johnson that a train was approaching at 60 feet per second. *Id.* As a result of the collision, Mr. Johnson suffered "severe and permanent injuries, consisting of a closed-head injury which has left him little more than a child." App. 3a. Mr. Johnson's wife, respondent Kerry Lynn Johnson, "suffered substantial loss of consortium." *Id.*

Respondents filed suit in Mississippi state court

claiming, among other things, that petitioner's negligence caused the crossing to be "extra hazardous" and that petitioner was liable for respondents' damages. Prior to trial, petitioner moved for partially summary judgment on the ground that any claim that the railroad crossing did not have adequate signals was preempted by federal law. Specifically, petitioner argued that such a claim was preempted by the Federal Railroad Safety Act (FRSA), as construed in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1995), because federal funds had allegedly been used to install warning devices at the Johnson Quarters Road Crossing. In support of the motion, petitioner submitted the affidavit of Newton McCormick, a Mississippi Department of Transportation (MDOT) employee, to which were attached documents purportedly evidencing the existence of federally-funded warning devices at the crossing. The trial court denied the motion for partial summary judgment, and, as explained further below, petitioner did not appeal from that decision nor did it contest the denial of partial summary judgment in its briefs to the Mississippi Supreme Court.[1]

At trial, McCormick asserted that federal money had been used sometime "back in the '80s" to fund an advance warning sign at the crossing. Tr. 150. He did not testify that he had seen the sign in place at the crossing or point to any documents evidencing federal funding, and, in fact, no one testified as to having seen the sign actually installed or in existence. After a five-day trial, the jury found petitioner negligent and awarded damages. One of the jury instructions regarding what constitutes an "extra hazardous" crossing

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[1]Moreover, as discussed below, neither McCormick's affidavit nor the documents submitted with it establish that safety devices were actually installed at the crossing with the use of federal funds.

permitted the jury to consider seven factors, including "[t]he fact that no active signals were in place." *See* Jury Instruction P-7A. After the verdict, petitioner filed a motion for judgment notwithstanding the verdict or for a new trial, which the trial court denied.

Petitioner appealed to the Mississippi Supreme Court from the jury's verdict and from the trial court's denial of its motion for judgment notwithstanding the verdict or for a new trial. Petitioner raised a number of issues on appeal, all of which were resolved in respondents' favor. As to preemption, petitioner argued briefly that the FRSA preempts any claim of "inadequate signalization" on the ground that the Johnson Quarters Road Crossing was protected by a federally-funded warning device, relying on McCormick's testimony as evidence of federal funding. The Mississippi Supreme Court rejected that argument: "KCS would like us to rely on the memory of one retired MDOT employee who claims to remember federal funds being spent at the particular crossing. We will not rule that federal funds have been spent where no documentation was produced in support thereof. There is no federal preemption in this case, and the matter is properly before this Court." App. 7a.

REASONS FOR DENYING THE WRIT

The petition should be denied for several reasons. First, the Mississippi Supreme Court did not, as petitioner contends, erect a "special evidentiary rule of documentary proof" to support a federal preemption defense. *See* Pet. (i). Rather, that court rejected petitioner's alleged evidence of federal funding at the Johnson Quarters Road Crossing because it failed to meet ordinary Mississippi law rules of proof. As a result, there is no federal question in this case. Second,

petitioner's second question presented is unavailing for an additional reason: Its factual premise — that the Mississippi Supreme Court relied on "changed circumstances" at the Johnson Quarters Road Crossing as the basis for its no-preemption holding — is simply not true. Finally, even if petitioner's preemption defense were adequately supported by proof under Mississippi law, and the errors of law that petitioner alleges were genuine, the petition should be denied because it does not present an important and recurring issue of federal law that warrants this Court's attention.

I. The Petition Raises Questions Of State Law That Are Not Subject To Review By This Court.

Petitioner claims that respondents' state-law "inadequate signalization" claim is preempted by the FRSA. The petition is premised entirely on the following syllogism: (1) Petitioner proved in the trial court that federal funds were spent for improvements at the Johnson Quarters Road Crossing. (2) Recent decisions of this Court hold that FRSA preemption of a state-law damages claim that seeks to impose liability on a railroad for failure to install a particular type of warning device at a railroad crossing is triggered by expenditure of federal funds to install warning devices at that crossing. (3) Therefore, respondents' claim seeking to impose such liability is preempted by the FRSA.

The fatal flaw in petitioner's argument is that the Mississippi Supreme Court rejected, as a matter of Mississippi law, the initial premise of the syllogism. It held that the evidence of federal expenditure was insufficient. Absent unusual circumstances, an evidentiary ruling of that kind is a question of state law that is not subject to review by this Court. Recognizing the need for a federal question, petitioner asserts that the Mississippi Supreme Court has created a "special

evidentiary rule of documentary proof to preclude the defense of federal preemption." Pet. (i). As shown below, that assertion is incorrect, and the petition should be denied on the ground that it does not present a genuine federal question.

1. The Mississippi Supreme Court held that "we will not rule that federal funds have been spent where no documentation was produced in support thereof." App. 7a. Petitioner disagrees, asserting that its preemption defense was, in fact, supported by documentary evidence. Pet. 9, 11. Petitioner relies on the affidavit of MDOT employee Newton McCormick, which petitioner attached to its motion for partial summary judgment based on federal preemption. As an initial matter, this Court need not consider whether the statements contained in the affidavit are sufficient to trigger preemption. Petitioner did not raise the propriety of the trial court's denial of its motion for partial summary judgment as an appellate issue in the Mississippi Supreme Court and that fact is fatal to the petition. In particular, petitioner did not mention the order denying summary judgment in its notice of appeal, *see* Notice of Appeal (filed Mar. 18, 1999), and, more fundamentally, it did not mention, let alone challenge, the trial court's summary judgment ruling in its appellate briefs. Under Mississippi law, therefore, petitioner waived this issue. *See, e.g., Cook v. Mardi Gras Casino Corp.*, 697 So.2d 378, 383 (Miss. 1997); *Dunn v. Dunn*, 2001 Miss. Lexis 140, *22 (May 24, 2001) ("the other issues not raised or addressed on this appeal are hereby deemed waived."). Thus, although petitioner decries the Mississippi Supreme Court's supposed failure to address McCormick's affidavit, *see* Pet. 11 & n.11, that court was simply responding to what was before it: an appeal from the jury's verdict and from the trial court's denial of petitioner's motion for judgment notwithstanding the verdict or for a new trial, Pet. 10, neither of which had anything to do with McCormick's affidavit or any

other "documentation" regarding preemption.[2]

Because the Mississippi Supreme Court did not consider the issue and petitioner did not present it to that court, this Court lacks jurisdiction to consider the evidentiary value of the McCormick affidavit. *See, e.g., United States v. Williams*, 504 U.S. 36, 41 (1992); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("Since the [state] Supreme Court did not pass on the question, we may not do so."); *see generally* R. Stern, et al., *Supreme Court Practice* 126-27 (7th ed. 1993).

2. Even if petitioner had properly preserved the summary judgment issue in the Mississippi Supreme Court, the trial court's denial of petitioner's motion for partial summary judgment based on FRSA preemption necessarily involved a garden-variety application of state evidence law and thus would not be properly before this Court. Petitioner is incorrect that the Mississippi Supreme Court created "a special rule of documentary proof" for the federal preemption defense. As noted above, the only evidence submitted in support of the motion for partial summary judgment was the McCormick affidavit. Under Mississippi law, an appellate court must

> analyze[ ] all affidavits, admissions in pleadings, interrogatory answers, depositions and other matters of record, and consider[ ] all such evidence in the light most favorable to the party against whom the motion for summary judgment was made. ...

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[2]Indeed, the McCormick affidavit and its attachments were not admitted in evidence or mentioned at trial and therefore they could not have had any logical connection to a motion for judgment notwithstanding the verdict or for a new trial.

> All motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion. A motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.

Burton v. Choctaw County, 730 So.2d 1, 3 (Miss. 1999) (citations omitted). "[A]ffidavits and other evidence must be sworn, made upon personal knowledge, and show that the party providing the factual evidence is competent to testify." *Id.* at 3-4. "[C]onclusory affidavits . . . have little value above that of the paper they are written on." *Kelley v. Frederic*, 573 So.2d 1385, 1387 n.2 (Miss. 1990). *See also Reynolds v. Amerada Hess Corp.*, 778 So.2d 759, 765 (Miss. 2000) ("affidavit . . . must do more than make general assertions and legal conclusions"); *Scott v. City of Biloxi*, 592 So.2d 1003, 1005 (Miss. 1991) (reversing summary judgment based on affidavit that was "conclusory, opinionated, and obviously based only on information and belief."); *Walker v. Skiwski*, 529 So.2d 184, 187 n.2 (Miss. 1988) (criticizing affidavits as "wholly conclusory. They give ultimate opinions with very little in the way of facts and specifics in support.").

Notwithstanding this heavy burden, petitioner claims that McCormick's affidavit constituted "clear, undisputed evidence" that federal funds participated in the installation of an advance warning sign at the Johnson Quarters Road Crossing. Pet. 13 n.12. The affidavit states (at ¶ 4):

> Specifically, federal funds were used, as described above, at the Johnson Quarter Road crossing, Pelahatchie, Rankin County, Mississippi, Crossing

> Identification Number 305120L, by installing one advance warning sign and one inventory marker. Attached hereto as Exhibit "A" and incorporated herein by reference are the MDOT documents reflecting these installations.

Although McCormick claimed that he was "personally familiar with the use of federal funds" (*id.* ¶ 1), his affidavit contains no factual basis for this conclusion, leaving the factfinder to speculate how McCormick knew that the money for the alleged sign came from the federal government.[3]

The affidavit does not explain how McCormick knew that the alleged sign was actually installed at the crossing, which presumably would have been stated had McCormick personally installed it. The reader is again left to speculate as to the basis for McCormick's knowledge of the sign's installation. This deficiency demonstrates that the affidavit did not meet the requirements necessary to obtain summary judgment in Mississippi:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Miss.R.Civ.P. 56(e). *See also Quay v. Archie L. Crawford and Shippers Express, Inc.*, 2001 Miss. App. Lexis 14, *20 (Jan. 9, 2001) ("no probative value can be accorded . . . testimony if

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[3]Respondents refer to the "alleged" sign because, as discussed below, there is considerable doubt whether *any* sign was installed at the Johnson Quarters Road Crossing.

there is a genuine issue as to whether [the witness] is testifying from personal knowledge.").

Petitioner points to the two pages attached to McCormick's affidavit as demonstrating the proof of federal expenditure. Pet. 11 n.11. However, those documents do not help petitioner because they do not state, or even suggest, that federal funds participated in the installation of an advanced warning sign at the Johnson Quarters Road Crossing. The first page, labeled "Crossings for County Rankin," suggests that an advance warning sign was at some time contemplated for the crossing (because what appears to be a "1" is under the heading "ADV WRN"), which the affidavit refers to as "Crossing Number 305120L," the same number referenced in the McCormick affidavit. *See* R. 408. On the other hand, under the column labeled "WARNING DEVICE," the entry for "Crossing Number 305120L" is "NONE," whereas there are specific entries (such as "crossbucks" or "stop signs") corresponding to the great majority of the other crossings. *See id.* This ambiguity is not addressed in McCormick's affidavit. Most significantly, the first page says *nothing* about the expenditure of federal funds. The second page — which appears to be a list of characteristics at various crossings, identified by number — refers to a project number and Rankin County. R. 409. However, absent from this list of crossing numbers is "305120L" referred to in McCormick's affidavit as the number corresponding with the Johnson Quarters Road Crossing. Thus, although petitioner makes much of the supposed fact that the second page contains "federally funded project number—RRP-0061(4)," *see* Pet. 11 n.11, nothing in the affidavit or the document itself establishes the significance of RRP-0061(4) or its connection to the Johnson Quarters Road Crossing. Thus, this case is a textbook example of one in which the "purported establishment of the facts has been sufficiently incomplete or inadequate that the trial judge cannot say with reasonable

confidence that the full facts of the matter have been disclosed." *Burton*, 730 So.2d at 4.

The trial court's finding that petitioner failed to meet its burden to establish the affirmative defense of preemption is not in any way inconsistent with the way in which summary judgment motions have been evaluated by that court in other cases. For example, in *Scott v. City of Biloxi*, 592 So.2d at 1004, the court addressed the propriety of a summary judgment based on the absence of insurance coverage. The City of Biloxi's motion for summary judgment was based on the affidavit of its mayor, who stated that the city had no insurance coverage for the incident in question. *Id.* The court noted that the city had failed to include in the record appropriate documentation reflecting the absence of insurance, and specifically held that "the absence of this document is not cured by the Mayor's affidavit which is conclusory, opinionated, and obviously based only on information and belief." *Id.* at 1005.

Here, in addition, strong circumstantial evidence contradicts McCormick's affidavit: the absence of the sign at the crossing. *See infra* Part II. No one testified that he or she personally installed the sign or actually saw the sign at the crossing after it was installed. This circumstantial evidence casts additional doubt on the reliability of the McCormick affidavit. *See Quay*, 2001 Miss. App. Lexis 14, *13 ("we are not aware of any case law which holds that circumstantial evidence is insufficient to raise a question of fact in the summary judgment context.").

3. In McCormick's trial testimony — which the Mississippi Supreme Court addressed and rejected as insufficient to prove the requisite federal expenditure — McCormick reiterated his previous conclusory statement that federal funds were spent "to put an advance warning sign back

in the '80s." Tr. 150. McCormick did not testify that he actually saw the sign after it was allegedly installed and did not explain how he had personal knowledge that the sign was purchased with federal funds. Moreover, McCormick's vague, conclusory testimony was circumstantially refuted by a survey plat of the crossing that did not indicate the presence of the sign. Ex. 27A, Tr. 171. And, at trial, petitioner offered *no documentary evidence at all* concerning the installation of the sign or the expenditure of federal funds for that purpose. Given the nature of the issue in question, there is good reason for the Mississippi Supreme Court's insistence on clear-cut documentary proof. There are hundreds, if not thousands, of crossings in Mississippi. R. 409 (suggesting that there are at least 32 crossings in Rankin County alone). As McCormick's vague testimony about what allegedly occurred "back in the '80s" demonstrates, it is important to secure definitive proof tying federal funding to specific work at specific crossings, rather than relying on the distant memory of a single employee. App. 7a.[4]

Petitioner essentially concedes that the question presented is one of state law when it notes that the Mississippi Supreme Court's rejection of McCormick's evidence "conflicted with both other courts and with Mississippi law on statements made under oath." Pet. 11. With respect to "other courts," petitioner's principal submission is that the decision below conflicts with *Hester v. CSX Transportation, Inc.*, 61 F.3d 382 (5th Cir. 1995), because *Hester* found preemption based, in part, on evidence from McCormick regarding expenditure of federal funds at another grade crossing. *Hester*

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[4]As noted *supra* note 2, petitioner chose not to introduce the documents it had previously attached to McCormick's affidavit.

is irrelevant. In that case, the railroad "presented evidence, *including* [MDOT] records" *and* an affidavit from McCormick showing that, for a two-year period, federal funds were actually expended for three specific safety upgrades at the crossing in question. *Id.* at 382 (emphasis added). The Fifth Circuit specifically found that "[t]he documentary evidence clearly demonstrates that federal funds did participate in the installation." *Id.* at 386 n.7. Here, as noted earlier, no documentary evidence was before the Mississippi Supreme Court because petitioner did not appeal from the denial of its motion for partial summary judgment; moreover, as shown above, even if that evidence had been before the court, it does not, to put it mildly, "clearly demonstrate" expenditure of federal funds for improvements at the Johnson Quarters Road Crossing.

More fundamentally, *Hester* does not demonstrate a conflict on the question presented: Because *Hester* arose in federal court, it necessarily ruled on the sufficiency of evidence under federal law, and the decision below necessarily did so under Mississippi law. Respondents believe that a federal court, confronted with the same lack of proof as presented here, would have come to the same conclusion as did the Mississippi Supreme Court.[5] However, the key point is that the sufficiency question is one of state law, not federal law, as was the case in *Hester*.

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[5]*See, e.g.*, *Marshall v. East Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319, 324 (5th Cir. 1998); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996); *Bellsouth Telecomms., Inc. v. W.R. Grace & Co.*, 77 F.3d 603, 615 (2nd Cir. 1996); *Davis v. Portline Transportes Mar. Internacional*, 16 F.3d 532, 537 n.6 (3rd Cir. 1994).

The foregoing discussion demonstrates the irrelevancy, at this stage of the litigation, of the McCormick summary judgment affidavit, and the evidentiary insufficiency of both that affidavit and McCormick's testimony to support a preemption defense. However, the question before this Court is *not* whether the Mississippi Supreme Court's evidentiary finding is correct as a matter of Mississippi law — although respondents believe it is — but rather whether the Mississippi Supreme Court created a special rule of evidence applicable only to preemption questions so as to especially burden the assertion of a federal defense. It did not, and therefore review should be denied.

II. This Case Does Not Present A "Changed Conditions" Issue, Which Further Undermines The Claimed Basis For Review.

Seeking to create a conflict between the decision below and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), petitioner claims that the Mississippi Supreme Court's no-preemption holding was based on that court's belief that "changed circumstances at a crossing following the installation of federally funded traffic control devices terminate the federal preemption of a railroad's duty under state tort law to install adequate warning devices at rail-highway crossings[.]" Pet. (i). Simply stated, that is not true. The court below did not hold that the claim here escapes preemption because circumstances changed after the installation of federally funded warning devices at the Johnson Quarters Road Crossing.

Petitioner is able to conjure up a "changed circumstances" issue only by putting words in the Mississippi Supreme Court's mouth. Petitioner baldly asserts that "[b]efore even considering the sufficiency of the evidence of McCormick's testimony, the Mississippi Supreme Court

rejected KCS's claim of federal preemption as to the federal funded warning sign on the ground 'there is no evidence of its existence' *at the time of the accident.*" Pet. 20 (emphasis added). But the Mississippi Supreme Court never used the term "at the time of the accident." *See* App. 7a. Rather, as explained below, it held that the evidence was insufficient to prove that a federally-funded sign was *ever* installed. *See id.*

Thus, the problem here is altogether different from a claim of changed circumstances. There is a lack of evidence in this case that a federally-funded warning device was ever installed at the crossing. *No one* testified that anyone actually saw the sign after it allegedly was installed, and, in fact, as explained above, one of the documents attached to the McCormick affidavit casts serious doubt on whether any sign was ever installed in the first place.

On this issue, it is useful to quote *Shanklin* in its entirety regarding "changed circumstances": "Whether the State should have originally *installed* different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Shanklin*, 529 U.S. at 358 (emphasis added). The assumption that installation is necessary to trigger preemption appears throughout the Court's opinion. *E.g., id.* at 357 ("When the FHWA approves a crossing improvement project and the State *installs* the warning devices using federal funds, [that] displaces state tort law addressing the same subject") (emphasis added); *id.* at 356 (referring to "devices *installed* for 'minimum protection' and those *installed* under a so-called 'priority' or 'hazard' program") (emphasis added). Thus, the Court understood that mere commitment of federal funds was not sufficient for preemption to occur. *Accord Powers v. CSX Transp., Inc.*, 97

F. Supp. 2d 1297, 1305 (S.D. Ala. 2000). The Court did say that a change in circumstances after installation, which might require a different type of warning device, would not be sufficient to defeat preemption, but that was not the basis for the Mississippi Supreme Court's ruling below.

III. Even If The Petition Presents A Properly Preserved Question Of Federal Law, And Even If The Decision Below Is Contrary To *Shanklin*, Review Should Be Denied.

Part I above demonstrates that much of the preemption defense (regarding the McCormick affidavit) was not properly preserved and that the petition depends wholly on a question of state, not federal, law. Part II demonstrates that this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Shanklin* were honored by the court below because petitioner failed to prove that a warning device was installed using federal funds. However, even if there were doubt on those questions, review should be denied for two separate, but related reasons.

First, assuming that the Mississippi Supreme Court misconstrued the evidence regarding expenditure of federal funds, the only question here would be whether, on the unique facts of this case, established preemption principles were violated. There is no question that the Mississippi Supreme Court understood the controlling preemption principle — expenditure of federal funds used for the installation of warning devices — because that principle was the focus of the preemption portion of its decision. App. 7a. Review of the decision below would thus involve asking whether the Mississippi Supreme Court misapplied this Court's FRSA precedents when it reviewed the particular evidence presented here, *i.e.*, a classic situation where review is inappropriate. *See*

S. Ct. Rule 10 (review "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

Petitioner seeks to evade that fundamental problem by claiming that the decision below "demonstrat[ed] an unwillingness to follow this Court's binding precedent." Pet. 21. But that is not so. Nothing about the decision below suggests disdain for this Court or for federal law, but only a concern that an affirmative defense be supported with adequate proof. In this case, if the denial of petitioner's partial summary judgment motion had been properly appealed and the relevant testimony and documents had proved an expenditure of federal funds to upgrade the relevant crossing (which they do not), the decision would have come out the other way because the court below plainly understood that preemption turns on the funding/installation question.[6]

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[6]Petitioner's criticism of the Mississippi Supreme Court's citation to *Pearson v. Columbus & Greenville Railway*, 737 So.2d 390 (Miss. Ct. App. 1998), *see* Pet. 21 n.18, is bewildering, since *Pearson* was discussed with approval by *petitioner* below. *See* Brief of Appellant, at 18, in *Kansas City So. Ry. Co. v. J.C. Johnson and Kerry Lynn Johnson*, No. 1999-CA-00505 (Miss. Dec. 13, 1999). To be sure, *Pearson* may reflect a pre-*Shanklin* understanding of the *kinds* of warning devices that must be placed at certain grade crossings. However, the Mississippi Supreme Court's decision had nothing to do with the kind of warning device that should have been installed at the Johnson Quarters Road Crossing. It was based solely on the failure of proof that *any* warning device had been installed with the use of federal funds. Indeed, the Mississippi Supreme Court relied on *Pearson* to buttress that

(continued...)

Complaining of "continued efforts to undermine [the] FRSA," petitioner asserts that the Mississippi Supreme Court's alleged error will have far-reaching effects on "many cases[,]" Pet. 23, but it does not point to a single decision other than the decision below in support of its position. Similarly, petitioner asks the Court to grant review "to make clear that, like with other changed circumstances claims, changes in the conditions of the crossing . . . are not relevant to federal preemption analysis under FRSA . . .." Pet. 21. But petitioner does not explain what "other," post-*Shanklin* changed-circumstances claims it is referring to, and the present case is certainly not one of them. As explained above (in Part II), the Mississippi Supreme Court did not hold that circumstances had changed, only that the railroad was required to prove installation of a warning device with federal funds at the grade crossing. The need to prove funding and installation is a natural and mundane outgrowth of the decisions in *Easterwood* and *Shanklin*. Implementing that aspect of *Easterwood* and *Shanklin* does not divide the lower federal courts or the state appellate courts, and petitioner does not argue otherwise. Thus, that issue does not warrant this Court's attention.

Second, not only would this Court's review turn on the highly idiosyncratic facts relating to federal funding at the Johnson Quarters Road Crossing (and thus affect only this case), but there is very little chance that the result below would be altered if review were granted. As noted above (at 2-3), under jury instruction P-7A, the jurors were told that, in

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[6](...continued)
aspect of its ruling. App. 7a ("*Pearson* stands for the proposition that there must be more than the existence of a [grade crossing] plan in that the plan must also have been implemented.").

deciding whether the crossing was "extra hazardous," they "may" consider, among seven different factors, "[t]he fact that no active signals were in place." That jury instruction provided the only arguable causal link between "inadequate signalization" and a finding of liability, and it does not suggest that signalization would have played a significant, if any, role in the verdict. That appears to have been petitioner's view as well, since it did not even object to the jury instruction on preemption grounds. Tr. 656, 683-84. Until petitioner began looking for a federal question on which to premise this Court's review, signalization played a minor role in this case. Indeed, even on appeal in the Mississippi Supreme Court, federal preemption took up only three short paragraphs in petitioner's 49-page brief. *See* Brief of Appellant, at 17-18, in *Kansas City So. Ry. Co. v. J.C. Johnson and Kerry Lynn Johnson*, No. 1999-CA-00505 (Miss. Dec. 13, 1999). On the issue of whether the crossing was "extra hazardous," petitioner focused on matters other than inadequate signalization, including the sight distance at the crossing, the condition of the roadway surface between the railroad ties, the "humpback" nature of the crossing, the varying width of the roadway surface, the degree of slope in the approach to the crossing, and the number of daily trains and their typical speed. *See id.* at 7-17, 20-21. Other issues, including petitioner's alleged failure properly to sound the train horn and to clear its right-of-way of obstructive vegetation, also figured prominently on appeal. *Id.* at 21-26, 40-41. In light of these non-preemption issues, all of which bore on whether petitioner's negligence caused respondents' injuries, it is quite unlikely that "inadequate signalization" played a role in the jury's liability finding and equally unlikely that a decision of this Court will affect the case's ultimate outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KANSAS CITY SOUTHERN RAILWAY COMPANY, INC.,
Petitioner,

v.

J.C. JOHNSON AND KERRY LYNN JOHNSON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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REPLY BRIEF OF PETITIONER

Kansas City Southern Railway Company, Inc.'s ("KCS") petition raises important federal questions regarding preemption by the Federal Rail Safety Act of 1970 ("FRSA") and 23 C.F.R. § 646.214: may the Mississippi Supreme Court create a special state-law evidentiary rule to evade FRSA preemption or hold that alleged changed circumstances at a grade crossing terminate FRSA preemption. Respondents raise misguided objections to this Court's jurisdiction and misrepresent the record in an unavailing attempt to deflect the Court's attention from the issues at hand. The Court should grant certiorari in order to resolve the significant federal questions presented, remedy confusion resulting from the split between the Mississippi Supreme Court and federal courts, including the Fifth Circuit, and vindicate the principle that state courts may not impair federal rights.

1. Respondent's claim that the preemption issues are not before this Court are frivolous. First, petitioner did not waive its preemption arguments before the Mississippi Supreme Court. Petitioner's appellate brief included the issue of whether "federal and/or state statutes and/or regulations preempt Mr. Johnson's claim that KCS was negligent for failing to provide additional or different warning devices at the subject crossing," and fully briefed *Easterwood* preemption in the argument section. Appellant's Br. 1, 17-18. Moreover, petitioner renewed its summary judgment preemption defense in its motion for judgment notwithstanding the verdict, an order which respondents acknowledge was appealed. Opp. 5. Mississippi procedure does not require an appellant to list separately the order denying summary judgment in its notice of appeal in order to preserve issues that were renewed in the JNOV motion. Finally, petitioner cited the affidavit of Newton McCormick, the long-time State Rail Engineer of the Rails Division of the Mississippi Department of Transportation ("MDOT"), and its incor-

porated documentary evidence, see R. 406 ¶ 4, to prove federal funding in both its main and reply appellate briefs.[1]

Respondents' waiver argument is also misplaced. As they concede, Opp. 6, this Court may review "an issue not pressed so long as it has been passed upon" by the court below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). To comply with *Williams*, respondents claim that "the Mississippi Supreme Court did not consider the issue ... [of] the evidentiary value of the McCormick affidavit." Opp. 6. But KCS seeks review of an express holding: that "documentation" is necessary to establish federal preemption. Pet. App. 7a. Respondents' objections are not even colorable.

2. Respondents concede that there is no *federal* rule that FRSA preemption can only be proved with documentation, and that the Mississippi Supreme Court imposed that requirement as a matter of *state* law. Nonetheless, respondents claim that the invocation of a state rule precludes review by this Court. Opp. 4-5. This argument likewise fails.

A state court's denial of a federal right or defense based on state law deprives this Court of jurisdiction only if the state law ground is "adequate and independent," and "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly and regularly followed.'" *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-63 (1982). Thus, a state law rule will be regarded as "inadequate" if it is "not fairly supported by state law because the requirement is novel or has been

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[1] *See* Appellant's Br. 18 (citing McCormick Aff., R. 405-06, to show that federal funds were used to install the advanced warning sign at the Johnson Quarters Road crossing with Federal Highway Administration approval); Appellant's Reply Br. 10, 11 (same). Petitioner included the summary judgment order on appeal, Appellant's R. Excerpts 26, and attached the affidavit and its accompanying documents to its motion for rehearing. *See* Mot. for Reh'g 6-7, 7 n.2, and Ex. 1. Notably, respondents addressed the affidavit and attached documents in their response to the motion for rehearing but did not assert waiver. *See* Appellees' Resp. to Mot. for Reh'g 7.

inconsistently applied." Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts And The Federal System* 580 (4th ed. 1996) (emphasis omitted); see *Staub* v. *City of Baxley*, 355 U.S. 313, 319 (1958); *Reich* v. *Collins*, 513 U.S. 106, 113 (1994). Unquestionably, the creation of special state evidentiary rules for federal preemption claims presents a federal question. *Burks* v. *Lasker*, 441 U.S. 471, 477 (1979) ("Legal rules which impact significantly upon the effectuation of federal rights must ... be treated as raising federal questions.").

3. The petition demonstrates that the Mississippi Supreme Court denied preemption based on a novel rule not supported in existing state law; its ruling on McCormick's testimony is contrary to established Mississippi law that uncontradicted testimony that is not inherently incredible must be taken as true for summary-judgment purposes. Pet. 15-17.

Citing authority that summary judgment cannot be based on "conclusory affidavits," Respondent claims that the lower court did not apply a new rule. Opp. 6-7. This is another red herring. McCormick's affidavit and his trial testimony were not conclusory. *United States* v. *Robinson*, 78 F.3d 172, 174 (5th Cir. 1996) (affidavit is conclusory if it attests to generalities or states a legal conclusion); *Kelley* v. *Frederic*, 573 So. 2d 1385, 1387 n.2 (Miss. 1990). Rather, he testified, based on personal knowledge as MDOT's rail engineer and as a member of the diagnostic team that placed signs throughout the state in the early 1980s, and supported by documentation, that the advanced warning sign at the Johnson Quarters Road crossing was installed with federal funds as part of a 1981-82 project. R. 405-09, Trial Tr. 141-42, 149-52.

More fundamentally, the lower court did not use the rule against conclusory affidavits to reject McCormick's testimony. Rather, it used a new, categorical rule specific to FRSA preemption to reject the testimony: "[w]e will not rule that federal funds have been spent where no documentation was produced in support thereof." Pet. App. 7a.

Because the lower court created a novel rule specific to FRSA preemption, and did not exclude McCormick's testimony as conclusory or lacking personal knowledge, respondents' extended argument, Opp. 9-13, that McCormick lacked personal knowledge of federal funding of the warning device because it was supposedly not installed is immaterial. But this argument is also both wrong (the project record clearly shows an installation of the warning sign[2]) and improper. Respondents never contradicted McCormick's sworn and unequivocal testimony at the summary judgment stage (or at trial) when they had the opportunity to do so, and instead made policy arguments (ultimately rejected by *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000)) regarding whether a diagnostic study was necessary to trigger preemption and whether the fact that the sign was allegedly missing in late 1995[3] precluded preemption. Indeed, at summary judgment, on appeal, and in response to petitioner's motion for rehearing before the Mississippi Supreme Court, respondents repeatedly *conceded* that federal funds were used to install the advanced warning sign at issue in this case.[4]

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[2] Respondents' factual challenges to McCormick's testimony and documentary support, even if permissible, are weak. First, respondents ignore that the trial court rejected their challenge to McCormick's ability to testify on these issues. *See* Pet. 13; Trial Tr. 148. Respondents' challenge to the documents offered by McCormick also strains logic, for the documents make clear in one column that an advance warning sign was installed at the Johnson Quarters Road crossing and, in another column, that no other warning device (stop signs or flashing lights) was installed at the crossing. It is also absurd to claim that McCormick's testimony was inadequate and not based on personal knowledge, given that he was MDOT's head engineer, personally participated in the project, and knew the sources of funding in that era. *See* Pet. 13-14 & nn.12, 13.

[3] *See infra* at 8 n.8.

[4] *See* R. 555 (acknowledging at summary judgment that "federal money [was] spent in 1982 to erect one 'advance warning sign' at the Johnson Quarters Road crossing"); R. 560 (acknowledging that "a few dollars of federal money may have been used to erect an advance warning sign at

Respondents cannot contest the credibility or the personal knowledge of the witness for the first time in this Court. His testimony was uncontradicted at trial (and on appeal), and the Mississippi Supreme Court treated it as such.

Thus, the question presented is whether the Mississippi Supreme Court can create a special evidentiary rule that only documentation, but not uncontradicted testimony, can establish FRSA preemption. Under Mississippi law uncontradicted evidence sufficient on its face[5] is accepted as true. See Pet. 16-17 (collecting cases). A straightforward application of that rule, in light of this Court's decisions in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993) and *Shanklin*, compels judgment as a matter of law for KCS on the issue of federal preemption.

The Mississippi Supreme Court's special requirement of documentary evidence in FRSA preemption cases falls within the category of state rules of procedure and evidence purposefully biased against federal rights and defenses. See *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934); Pet. 17-18. This novel rule is especially pernicious, given the

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Johnson Quarters Road"); Appellees' Br. 23-24 (acknowledging that "a few dollars may have been used to erect an advance warning sign at Johnson Quarters Road" and arguing against preemption because "federal officials did not determine that the passive warning device (one advance warning sign) installed at the Johnson Quarters Road crossing was adequate to protect the traveling public"); Appellees' Resp. to Mot. for Reh'g 8 (conceding "that once upon a time that sign, paid for with an undetermined amount of federal money, was standing upright").

[5] *See Burton* v. *Choctaw County*, 730 So. 2d 1, 3-4 (Miss. 1997) (stating that "affidavits and other evidence must be sworn, made upon personal knowledge, and show that the party providing the factual evidence is competent to testify); *Palmer* v. *Biloxi Reg'l Med. Ctr.*, 564 So. 2d 1346, 1356 (Miss. 1990) ("Mere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment."). As discussed below, a straightforward application of federal law identical to Mississippi law also dictates that KCS should have been granted judgment as to federal preemption.

potential for conflict with 23 U.S.C. § 409, which limits the *admissibility* of certain categories of documentary evidence bearing on railway crossing safety. The unique evidentiary rule created below will thwart the rational operation of FRSA preemption; this Court both may and should resolve the question presented in order to vindicate the Supremacy Clause and Congress's express intent.

4. Once respondents' irrelevant claims are put aside, it is clear that the decision below creates an irreconcilable split on the first question presented between the Mississippi Supreme Court and the Fifth Circuit, which includes Mississippi. The cases forming the split both involve McCormick's uncontradicted testimony, buttressed by project records, as to federal funding for installation of passive warning devices for FRSA preemption purposes—yet the Mississippi Supreme Court rejected his testimony, while the Fifth Circuit ruled that the testimony compelled judgment as a matter of law. Compare Pet. App. 7a, with *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995).[6]

Moreover, contrary to respondents' claims, Mississippi and the Fifth Circuit apply the same law in analyzing motions for

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[6] Respondents cite *Hester*'s statement that "[t]he documentary evidence clearly demonstrates that federal funds did participate in the installation," but the Fifth Circuit was using the term "documentary evidence" to refer to both "Mississippi Department of Transportation (MDOT) records and the affidavit of Newton McCormick." 61 F.3d at 386 & n.7. There is no basis for respondents' surmise that the MDOT records were different in the two cases. When state highway agencies seek federal funding to install passive devices (such as crossbucks and warning signs) at rural crossings of the kind at issue in this case, *Hester*, *id.* at 386 & n.6, and *Shanklin*, 529 U.S. at 350, they propose a project to install signs for large numbers of crossings; in approving such projects, the Federal Highway Administration allocates funds for the project as a whole, not on a crossing-by-crossing basis, *see, e.g.*, *Shanklin*, 529 U.S. at 350 (project covering 196 grade crossings in 11 counties). Indeed, in both *Hester* and this case, the signs at issue were installed as part of federally funded MDOT projects from 1981-83. *See* R. 405 ¶ 2; *Hester*, 61 F.3d at 386.

summary judgment,[7] and both systems permit judgment as a matter of law, see Miss. R. Civ. P. 50; Fed. R. Civ. P. 50. Each system has the same rules regarding affidavits, compare Miss. R. Civ. P. 56(e), with Fed. R. Civ. P. 56(e), and similarly condemns conclusory statements, compare *Kelley*, 573 So. 2d at 1387 n.2, with *Robinson*, 78 F.3d at 174. Thus, the lower court, by failing to apply rules regularly applied by it and the Fifth Circuit, fashioned an exception unique in both the federal and state courts in Mississippi, created a conflict with the Fifth Circuit, and caused inconsistency in an area of law where national uniformity is both necessary and mandated by Congress.

5. In the second question presented, petitioner showed that the Mississippi Supreme Court's alternative holding—that there could be no preemption on the basis of a federally funded advanced warning sign because "there is no evidence of its existence," Pet. App. 7a—violated this Court's holding in *Shanklin*, 528 U.S. at 358-59, that changed circumstances at the crossing do not terminate federal preemption of the railroad's duty under state tort law. See Pet. 19-23.

Respondents' rejoinder that petitioner is "putting words in the Mississippi Supreme Court's mouth," Opp. 13, and that the court below based its holding on "a lack of evidence in this case that a federally funded warning device was ever installed at the crossing," *id.* at 14, is specious. First, this was an alternative holding to the holding that McCormick's testimony was legally insufficient: *i.e.*, that *even if* federal funds participated in the installation of a warning device, as McCormick testified, there was no preemption because no

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[7] *Compare Travis* v. *Stewart*, 680 So. 2d 214, 216-17 (Miss. 1996), *with Robinson*, 78 F.3d at 174. The rules mandate that "[t]he judgment sought *shall* be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c) (emphasis added); Fed. R. Civ. P. 56(c).

warning device existed. Pet. 20. This is clearly a changed-circumstances holding in contravention of *Shanklin*.

Second, the only evidence (other than McCormick's) of signs at the crossing was evidence postdating the accident.[8] The holding that there was no evidence of a warning sign, Pet. App. 7a, must refer to the time of the accident.

Third, respondents conceded throughout the case that the advanced warning sign was installed at the crossing but argued that changed circumstances, *i.e.*, that the sign was allegedly not in place on the date of the accident, precluded FRSA preemption.[9] Thus, contrary to respondents' assertions of surprise, one issue on appeal was whether alleged changed circumstances—under the control of the state, and not the railroad—could terminate FRSA preemption created when a warning device is installed with federal funds.

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[8] The only evidence that the advanced warning sign was missing *at any time* was a December 1995 plat survey—five months after the collision at issue. Respondents fault petitioner for not putting on evidence that "anyone actually saw the sign after it allegedly was installed." Opp. 14. But McCormick unequivocally testified at trial that the sign was installed with federal funds. Trial Tr. 149. The claim that the sign never existed is an argument that itself never existed until respondents asserted it before this Court to justify the Mississippi court's rule.

[9] *See, e.g.*, R. 555 ("Plaintiffs' threshold position is that KCS has produced no evidence that the sign presumably erected in 1982 was still in place at the time of the crash in 1995.") (emphasis removed); Appellee's Br. 26 ("[I]t was incumbent upon KCS at trial to offer evidence that the advance warning sign was actually operational at the time of the collision.") (emphasis removed) (citing evidence that advance warning sign was not in place in December 1995, five months after collision at issue in this case); *id.* at 28 (stating that "[t]he conditions at many railroad crossings change over time" and that changed conditions should be considered in evaluating federal preemption claims); Appellee's Resp. to Mot. for Reh'g 7-8 (discussing alleged changed circumstances and asserting that sign must be both "'installed *and* operating' at the time of the accident" for federal preemption to apply).

6. Beyond trying to create baseless factual disputes or otherwise insulate this case from review, respondents neither address nor undermine the arguments favoring certiorari. While all cases involving federal preemption implicate the Supremacy Clause, U.S. Const. art. VI, § 2, the Mississippi Supreme Court's decision to create a special rule in order to defeat federal preemption particularly implicates the interplay between federal and state courts and the law which they apply. Indeed, this Court has often granted certiorari in order to protect federal statutes from discriminatory treatment by state courts, see Pet. 17-18 (collecting cases), and to prevent "state courts [from] dissociat[ing] themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source," *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 371 (1990).

Similarly, the lower court's conclusion that changed conditions affecting a warning device installed with federal funds may terminate preemption undermines federal law and Congress's goal of "national[] uniform[ity]" in the area of railway safety. 49 U.S.C. § 20106. It also presents an insoluble problem for railroads: if the decision below stands, railroads will be unable either to rely on warning devices deemed adequate under FRSA, Section 646.214, and *Shanklin*, or to ensure that the warning devices are properly maintained. See Pet. 22-23 (noting that Federal Highway Admin., U.S. Dep't of Transp., *Manual on Uniform Traffic Control Devices for Streets and Highways* (1988) and Mississippi state law vest sole authority in state roadway agencies to place and maintain traffic control devices). In light of *Shanklin* and of the myriad problems that will occur if railroad tort liability turns on a state or locality's failure to maintain warning devices on public roads, this Court should grant certiorari in order to affirm that *Shanklin*'s conclusion that changed circumstances do not affect FRSA preemption, see *Shanklin*, 529 U.S. at 358, applies where a warning device has allegedly changed.

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As Congress recognizes, railway safety requires national uniformity in order to ensure that all involved entities know who is responsible to act in a given context in order to ensure the safety of all who use railway-highway intersections. Faced with a person injured at such an intersection, the Mississippi Supreme Court sought to evade federal preemption in order to place liability on KCS. Thus, as respondents concede, see Opp. at 18; see also Trial Tr. 651-52 (arguing for active signalization instruction), the trial court submitted to the jury the question of whether KCS should have placed active warning devices (such as gates and flashing lights) at the Johnson Quarters Road crossing.[10] The Mississippi Supreme Court's decision does not merely treat this particular railroad unfairly in this particular case. Rather, if permitted to stand, the lower court's decision will contribute to uncertainty by creating disparity in treatment across the country and between federal and state courts, while also undermining the supremacy of federal law. This Court should act to protect the important goals and principles underlying federal preemption in the area of railway safety.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[10] Respondents' claim that there are other possible grounds for the verdict, Opp. 17-18, is irrelevant; petitioner's objection is to the jury instruction allowing liability for inadequate devices. *See Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) ("In jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury."). This Court frequently receives, and rejects, in tort cases such objections to this Court's review. *See, e.g., Shanklin*, 529 U.S. at 351; Resp't Pet. Opp. at 8-9, *Shanklin*, 529 U.S. 344 (2000) (No. 99-312).

Respectfully submitted,

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